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ABSTRACT

The Law section of the Proceedings contains the following 13 papers: "Link Law: The Evolving Law of Internet Hyperlinks" (Mark Sableman); "Bits, Bytes and the Right to Know: How the Electronic Freedom of Information Act Holds the Key to Public Access to a Wealth of Useful Government Databases" (Martin E. Halstuk); "Mirrored in Parody, Mired in Paradox: Trademark Dilution and An Ancient Art" (Stephen J. Earley); "The Supreme Court and its 'Public': The Maturation of Theory and Interpretation" (Susan Dente Ross); "The Viability of the Libel-proof Plaintiff Doctrine Following the Masson Decision" (Raymond N. Ankney); "Building Bridges: Metaphors and Analogies Used by Courts in Cases Involving the Internet" (Stephanie Lyn Beck); "Merging Law and Ethics: Discourse Legal Theory and Freedom of Expression" (David S. Allen); "Mass Communications Research in First Amendment and Other Media-Related Federal Court Opinions" (Dane S. Claussen); "Behind the Veil: The Rights of Private Individuals in the Wake of 'Hustler' v. Falwell" (Diane L. Borden); "When News Artists Take without Asking: Digital Photo Collage as Transformative Commentary" (Wilson Lowrey); "Setting New Boundaries: How Iowa Newspaper Editors Are Applying a New Law Granting Them Expanded Access to Juvenile Names" (Constance K. Davis); "Revisiting Free Speech on Private Property in the New Information Environment: A First Amendment Response to the Private Ownership Model" (JoAnne Holman); and "The Journalist's Privilege for Nonconfidential Information in States with Shield Laws" (Anthony L. Fargo). (CR)

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LINK LAW: THE EVOLVING LAW OF INTERNET HYPERLINKS

by Mark Sableman

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> [T]he freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment.[1]

Alas, if only the law affecting *on-line associations*—Internet hyperlinks—were so clear. What about the freedom to associate oneself with another's postings, products, content or trademarks on the Internet? How about the essential ability of a web publisher "to ... link to absolutely any piece of information that can be accessed using networks,"[2] to use the words of the inventor of the World Wide Web?

The answer is that, although it may disappoint Internet enthusiasts, the law recognizes no absolute right to associate or link on the Internet, and, rather, imposes limits and penalties on linking in some kinds of situations. As business grows on the Internet, it seems likely that linking rights will depend upon the business-oriented laws of unfair competition and intellectual property, not any free and uninhibited "right" to link.

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[1] *NAACP v. Alabama*, 357 U.S. 449, 460 (1958).

[2] T. Berners-Lee, "Realizing The Full Potential of the Web," Dec. 3, 1997, found at www.w3.org/1998/02/Potential.html.

This article examines the first few Internet link law cases, how the legal positions have been framed, and the basis on which those cases which have been fought or resolved. It suggests that, contrary to the original ethos of Internet use, which celebrated hyperlink technology and encouraged everyone to use it to the greatest extent possible, in the era of business use of the Internet, linkages will often be scrutinized and controlled—and sometimes discouraged, litigated, or penalized.

Hypertext links are the signature characteristic of the World Wide Web. The ability to jump from one page to another through hypertext links makes the web exciting and attractive to viewers. Both creation and use of hyperlinks are relatively simple tasks, which can be accomplished unilaterally by the author or reader of a web page:

> As computer programming goes, adding a web link on a home page is relatively simple and requires only knowing the address of the linked page. The WWW technology—based on a simple programming language called HTML (HyperText Mark-up Language)—does not require coordination from both ends of a link to establish one. * * * [T]he simplest link acts merely as an automated directory—when the hypertext link is clicked with the mouse, the connection to the page with the link is dropped and the user's computer then connects with the linked site, without further connection with the original page. * * * The simplicity of making web links and the lack of any centralized control are largely to credit for the enormous (and somewhat anarchic) growth of the Web.[3]

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[3] Interactive Services Subcommittee, Law of Commerce in Cyperspace Committee American Bar Association Section of Business Law, *Web-Linking Agreements: Contracting Strategies and Model Provisions* (1997), Introduction, *available at* www.abanet.org/buslaw/cyber/weblink.html.

Tim Berners-Lee "invented" the World Wide Web at CERN [the European Particle Physics Laboratory] in 1990.[4] He sought to create "an intuitive interface" which would permit "the computers, networks, operating systems and comments ... to become invisible" so that users could communicate and access information directly.[5] Universally free linking of information was essential to Berners-Lee's original dream:

> The Web was designed to be a universal space of information, so when you make a bookmark or a hypertext link, you should be able to make that link to absolutely any piece of information that can be accessed using networks. The universality is essential to the Web: it loses its power if there are certain types of things to which you can't link.
>
> There are a lot of sides to that universality. You should be able to make links to a hastily jotted crazy idea and to link to a beautifully produced work of art. You should be able to link to a very personal page and to something available to the whole planet. There will be information on the Web which has a clearly defined meaning and can be analyzed and traced by computer programs; there will be information, such as poetry and art, which requires the full human intellect for an understanding which will always be subjective.
>
> ***
>
> For this to work, it had to be not only easy to 'browse', but also easy to express oneself. In a world of people and information, the people and information should be in some kind of equilibrium. Anything in the Web can be quickly learned by a person and any

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[4] *See* Steve Lohr, "His Goal: Keeping the Web World Wide.) *N.Y. Times*, Dec. 15, 1995 at D1. Berners-Lee came up with the standards for addressing, linking language, and transferring the multi-media documents on the Web: URLs (universal resource locators), HTML (hypertext mark-up language), and HTTP (hypertext transfer protocol).

[5] T. Berners-Lee, "Realizing The Full Potential of the Web," Dec. 3, 1997, found at www.w3.org/1998/02/Potential.html.

> knowledge you see as being missing from the Web can be quickly added. The Web should be a medium for the communication between people; communication through shared knowledge.[6]

Not only experts like Berners-Lee but also many nontechnical web users perceive hyperlinking as essential to the operation of the web, or, at least, a mechanism so basic and essential that its use could not possibly be unlawful. Additionally, most Internet users see links as desirable on all sides and are puzzled by any legal scheme that would penalize or restrict use of such mutually beneficial roadmaps and accolades. Typical of this view is a terse posting on an Internet newsgroup asserting that "To ask permission to link to a page borders on the inane. Next we will have the position that you cannot recommend a book in the local library without the author's permission."[7] Undoubtedly most linkers and linkees do perceive the links that are established as beneficial to them, for reasons of commerce, prestige, and ease of Internet navigation.

When we travel from the world of academics, technology enthusiasts, and information-loving individuals into the business world, however, different concerns arise. Businesses care not for activity for its own sake, or for the sake of wisdom and truth; businesses care about whatever furthers—or impedes—their commercial purposes. For business, the goal is not sharing of information *per se*, but sales and business growth. Business therefore care about what information is shared, with whom, and in what context—especially when the communications involved interfere with their sales or marketing. Hence, hyperlinks may be problems, in the context of business and advertising, since hyperlinks may raise issues of, among others, false advertising, unfair competition, trademark or copyright infringement, disparagement, tarnishment, "passing off," or interfering with one's business expectancies.

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[6] *Id.*

[7] Attributed to a posting by Owen Cook, dated September 14, 1997. Found at www.dgl.com/msg/messages/7.html.

A. Laws That May Affect HyperLink Usage

The laws of unfair competition and intellectual property provide the backdrop for most hyperlink disputes. This section briefly describes the primary legal claims which are expected to be raised based on unauthorized hyperlinks.

1. Trademark Infringement

A trademark or service mark is any word, name, symbol, or device or any combination thereof adopted and used by a manufacturer or merchant to identify his goods or services and distinguish them from those manufactured or sold by others.[8] Trademarks indicate origin—that is, they distinguish one party's products or services from those of competitors. Trademarks may also serve to guarantee the quality of the goods or services bearing the mark, and through advertising, they may help create and maintain a demand for the product or service.[9]

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[8] 15 U.S.C. § 1127.

[9] *Berner Int'l Corp. v. Mars Sales Co.*, 987 F.2d 975 (3d Cir. 1992).

Trademark infringement occurs when one party uses a mark that is so similar to that of another, such that consumers are likely to be confused.[10] Likelihood of confusion depends on may factors, including: (1) the strength of the owner's mark; (2) the similarity between the owner's and alleged infringer's mark; (3) the degree to which the products compete with each other; (4) the alleged infringer's intent to "pass off" its goods as those of the trademark owner; (5) incidents of actual confusion; and (6) the type of product, its cost, and conditions of purchase.[11] Generally, strong trademarks are entitled to more protection than weak ones.[12] Reverse trademark confusion may occur when a trademark infringer so saturates the market with promotion of his mark that consumers come to believe that the infringer, rather that the plaintiff, is the source of the trademarked product.[13]

Not all use of the trademarks of another constitutes infringement. In many cases, trademarks may describe a person, a place or an attribute of a product. For example, one may say "Let's take a vacation to Disney World," or "I have the data in Excel" without violating the trademark rights of Walt Disney Company or Microsoft

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[10] 15 U.S.C. § 1114.

[11] *Co-Rect Products, Inc. v. Marvy! Advertising Photography, Inc.*, 780 F.2d 1324, 1330 (8th Cir. 1985); *Squirtco v. Seven-Up Co.*, 628 F.2d 1086, 1091 (8th Cir. 1980); *C. Blore & D. Richman Inc. v. 20/20 Advertising*, 674 F. Supp. 671, 681 (D. Minn. 1987).

[12] *McDonald's Corp. v. Druck & Gesner*, 814 F.Supp.1127 (E.D.N.Y. 1993).

[13] *Murray v. Cable National Broadcasting Co.*, 86 F.3d 858 (9th Cir. 1996).

Corporation. Thus trademark law recognizes a defense where the mark is used only "to describe the goods or services of [a] party, or their geographic origin."[14]

2. Trademark Dilution

Even when a trademark is not infringed (that is, when there is no likelihood of confusion), one who uses a similar mark may be guilty of trademark dilution. Trademark dilution occurs when one dilutes the distinctive quality of a trademark. Confusion and dilution involve different states of mind. Confused consumers think there is a connection with the trademark owner. In the case of dilution, although members of the public make a mental connection between the marks, they are not actually confused. Nonetheless, the consumer's association of the two marks makes the original mark less valuable, either because it reduces the distinctiveness of the original mark, or because it disparages or tarnishes the images associated with the original mark.[15] Trademark dilution is prohibited by the laws of about twenty-five states,[16] and with respect to "famous" marks, by federal law.[17]

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[14] 15 U.S.C. § 1115(b)(4). *See also* RESTATEMENT (THIRD) OF THE LAW, UNFAIR COMPETITION, § 28, comment a ("Reasonable use of a descriptive term by another solely to describe the nature or characteristics of its own goods or services will not subject the user to liability for infringement").

[15] *See generally* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 25.

[16] *E.g.*, Cal. Bus & Prof Code § 14330; Fla. Stat. Ann. § 495, 151; 765 ILCS 1036/65 [Illinois]; Mo. Rev. Stat § 417.061(1); NY Gen Bus. Law § 368-d; 54 Pa. Cons. State Ann. § 1124; Tex. Bus & Com. Code. Ann § 16.29.

[17] 15 U.S.C. § 1125(c).

3. Passing Off

"Passing off" or "palming off" refers to deceptive marketing in which one party attempts to "pass off" its goods or services as those of another.[18] Passing off is illegal under the Lanham Act's prohibitions against a false description or false designation of origin, since this encompasses selling one's goods under the name of a competitor.[19] It also reaches merchandising practices that are "'economically equivalent' to palming off."[20] Such practices include a false designation of origin through "reverse palming off," when one attempts to pass off a competitor's products as one's own.[21] This may be accomplished, for example, by removing or obliterating the original trademark, without authorization, before reselling goods produced by someone else.[22]

4. Copyright Infringement

Under current law, copyright protection attaches to every creative work—broadly construed to include not only books, paintings and sculptures, but also movies, plays, musical compositions, recordings, photographs, computer software code, architectural designs, and even routine business writings—as soon as the work is created and, in the words of the Copyright Act, "fixed in a tangible medium of expression."[23] Copyright infringement occurs when someone with access to a copyrighted work creates a substantially similar work, and uses it in a way that violates the copyright owner's five exclusive rights.[24]

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[18] *See* RESTATEMENT OF UNFAIR COMPETITION § 4 (1995).

[19] 15 U.S. C. § 1125(1). *Roho, Inc. v. Marquis*, 902 F.2d 356, 359 (5th Cir. 1990); *Lamothe v. Atlantic Recording Corp.*, 847 F.2d 1403, 1406 (9th Cir.1988).

[20] *Smith v. Montoro*, 648 F.2d 602, 605 (9th Cir.1981).

[21] RESTATEMENT OF UNFAIR COMPETITION § 5 (1995).

[22] *Id.*

In addition to the person who directly infringes someone's copyright, others who induce, cause or materially assist in the infringement may be guilty of contributory infringement.[25] Courts generally require that the contributory infringer be proven to know or have reason to know that the original work was improperly copied.[26]

Not all copying or imitating of a copyrighted work constitutes infringement. Some creative expression (like book titles and short advertising slogans) may be too short or lacking in originality to qualify for copyright protection.[27] Some copying may be permissible as personal use or fair use, or for "transformative" uses such as parody and commentary.[28] Finally, copyright protection has a limited term, and works for which the copyright term has expired, or which never entered into copyright protection, are in the public domain and are free for anyone to reproduce or initiate.

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[23] 17 U.S.C. § 102.

[24] 17 U.S.C. § 501; *Nicholas v. Universal Pictures Co.*, 45 F.2d 119 (2d Cir. 1930).

[25] The doctrine of contributory copyright infringement originated with Justice Oliver Wendell Holmes' decision in *Kalem Co. v. Harper Bros.*, 222 U.S. 55 (1911).

[26] *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971).

[27] 17 U.S.C. § 102(b).

5. False Advertising

A section of the federal trademark act, the Lanham Act, contains a broad prohibition against making of false statements in connection with commercial advertising or marketing. Section 43(a) of the Lanham Act has been characterized as creating a federal law of "false advertising," "deceptive marketing," or "unfair competition."[29] Whatever its name, the sweep of the claim created by this section is wide: it covers all "false descriptions of fact," made in commercial advertising or marketing activities, that relate to one's own, or a competitor's, goods, services or commercial activities.[30] Where this section is violated, the violator may be liable in a damages action for the harmed party's lost profits, the violator's own profits due to its misconduct, and, in egregious cases, up to treble damages and an award of attorney's fees.[31]

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[28] *See* text at notes 82-84 *infra.*

[29] 15 U.S.C. § 1125(a). *See* Senate Report 100-515 at 40, reprinted in U.S. CODE CONG'L AND ADMIN. NEWS 5577, 5603 (Section 43(a) "has been widely interpreted as creating, in essence, a federal law of unfair competition"); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 2 (1995).

[30] 15 U.S.C. § 1125(a).

Some states have state laws modeled after the Federal Trade Commission Act, which broadly prohibit unfair trade practices.[32] These laws vary widely in their scope, provisions, and opportunities for private enforcement. Additionally, the Federal Trade Commission has power over all advertising that occurs in interstate commerce, but its enforcement efforts are necessarily highly selective. Finally, the National Advertising Division of the Council of Better Business Bureaus, the advertising industry's self-regulatory arm, resolves false advertising claims based on national advertising on a voluntary basis.[33]

6. Libel and Trade Libel

Libel claims are frequently asserted—though they rarely succeed—in business disputes. For a statement to be libelous, it must be published of and concerning the plaintiff, it must be false, and it must constitute seriously disparagement, such as an accusation of serious criminal conduct, inability or incompetence in a business or profession, sexual misconduct, or a loathsome disease.[34]

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[31] 15 U.S.C. § 1117.

[32] *E.g.*, Illinois Consumer Fraud and Deceptive Trade Practices Act, 815 ILCS 501/1 *et. seq.*

[33] *See* Better Business Bureau, "The National Advertising Division Advertising Inquiry Process," at www.bbb.org/advertising/inquiry/process.html.

[34] *E.g.*, *Pope v. Chronicle Publishing Co.*, 95 F.3d 607 (7th Cir. 1996).

Privileges immunize or protect many otherwise libelous statements—for example, the privilege to report information derived from official government documents and proceedings.[35] And constitutional First Amendment protections may bar or limit recovery in many situations, particularly where the plaintiff is a public official or public figure.[36]

The common law tort of trade libel (sometimes known as product disparagement, injurious falsehood, or slander of title) is somewhat more closely tailored to business disparagement situations. It occurs when a false statement of fact is published concerning someone's goods or business services, maliciously disparaging their quality, and causing special damages.[37]

B. Hyperlink Claims, Real and Potential

In the few years since Tim Berners-Lee invented the World Wide Web, hyperlinks have proliferated on the global network. Only a few of the millions upon millions of Internet links have led to litigation. But a few initial cases have signaled likely legal limitations on linking. This section discusses early linking cases, and other linking claims that we may expect to see.

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[35] *See generally* RESTATEMENT (SECOND) OF TORTS § 599-605.

[36] *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

[37] RESTATEMENT (SECOND) OF TORTS § 623 A; *see also, National Refining Co., v. Benzo Gas Motor Fuel Co.*, 20 F.2d 763 (8th Cir. 1927) (describing "three different classes or grades of defamatory statements in reference to the goods or products of tradesmen"—libel, trade libel, and "puffing").

1. Copyright Infringement Through Direct Linking—The *Shetland News* Case

The world's first widely noted hyperlink lawsuit arose in the Shetland Islands of Scotland, out of an electronic newspaper rivalry. The established *Shetland Times* challenged the upstart *Shetland News* in court in late 1996, claiming that the *News*'s hyperlinks to some of the *Times*'s stories constituted copyright infringement.[38] The case deserves attention not only because it was a trailblazer, but also because it demonstrates the dramatically divergent views of the parties concerning hyperlinks.

Dr. Jonathan Wills, the editor of the *News*, obviously viewed himself and his innovative paper-and-electronic newspaper as advanced trendsetters, familiar with new technology and its uses. And he viewed his rival (and former employer) the *Times* as stoggy and backward (though it too issued an electronic edition in 1996). The *News* offered its readers tangible evidence of its competitive preeminence—it linked to the *Times* for any news stories missed by the *News*. Of course, the link did not only served the *News'* readers; it also subtly highlighted how few stories the *News* missed.[39]

When the *Times* protested the *News's* periodic links to its stories, Dr. Wills, the Web-savvy editor of the *News*, expressed his disbelief that anyone would complain about hyperlinks. Wills even published, with commentary, his personal sarcastic reply to the *Times's* cease-and-desist letter:

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[38] *See* "Internet Links Could Take a Hit in Scottish Feud," *Christian Science Monitor*, Dec. 3, 1996; "War in the Shetlands! - Internet Style," *Editor & Publisher*, Oct. 30-31, 1996.

[39] *See* Statement of *Shetland News* Editor Dr. Jonathan Wills at http://www.shetland-news.co.uk/headline/interdict/interdict.html.

> Choking back tears of mirth, Dr. Wills replied as follows: 'Thank you so much for your fax message, which has given me no end of fun. It's good to see that you have not lost your legendary sense of humor after all these years.
>
> 'Just in case there is the teeniest chance that you were being serious, let me explain a few point of which you, as a relative newcomer to the Internet publishing business, may not be aware.
>
> 'The principle of the Internet is free access. We have no turnstile where we vet or charge readers. Nor do you. What we have done, are doing and will continue to do is direct our readers to your website on those occasions when your six editorial staff [sic] manage to come up with a story which our single member of staff has either missed or not got around to writing. You are in good company. We do the same for the Herald, CNN, Le Monde, La Stampa and dozens of other Internet news publishers. Take a look at the Icelandic volcano site, for example: it puts into perspective your own little explosion this evening (which I am sure you will regret and have a quiet giggle over, once you calm down and realize what a silly billy you've been).
>
> 'At no time have we infringed your undisputed copyright, nor have we made any use whatsoever of your material in our own pages. If we did, we would pay you our normal, single-use, electronic reproduction fees at NUJ rates. Where we give a free link to a *Shetland Times* story which we think would interest our readers, we send them straight to your very own page, not to one of ours. When they get there they are looking at *The Shetland Times*, not at *The Shetland News*. They know this because the page carries your own banner and copyright notice. To make doubly sure that the reader is not confused, we make no alterations to your pages at all. A moment's reflection will

> tell you that we couldn't possibly do that, anyway. We also leave untouched any pictures you may be carrying. Because they are of such low technical quality, there is no chance that our readers could possibly imagine they were still looking at the *Shetland News* site.
>
> 'We don't need your written permission to put up links to your site, or to any other. You ought to be jolly pleased, because we are bringing you hundreds of readers a day whom you wouldn't otherwise have. In fact, we would normally charge someone for the privilege of such links from our busy site, but, in the interests of our readers and out of a feeling of solidarity with your complementary WWW operation, we wouldn't dream of sending you an invoice. You see, whatever you feel about us, we don't regard you as a competitor.
>
> 'It would be nice, once you're feeling better, if you could reciprocate—rather than threaten to retaliate. But I'll quite understand if you don't do that right away. These things take time, after all, I know it's difficult to understand but the WWW is quite different from print media. Different rules apply and at first they are surprising.'[40]

The *Times*, however, was quite serious. It sought a court order to prevent such linkages. And the next publication in the *News* on the dispute took a distinctly different tone than Dr. Wills' confident response letter:

> We regret that part of our service to readers has been censored by unprecedented court action at the instigation of Robert Wishart, managing director of *The Shetland Times*

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[40] "Internet Publisher Doesn't Want the Hits," *Shetland News*, Oct. 16, 1996, formerly posted at www.shetland-news.co.uk/headline/wishart/wishart.html.

> *Ltd.* He can be reached by e-mail at r.wishart@shetland-times.co.uk.[41]

In court, the *Shetland Times* had sought to restrain the *News*'s unauthorized links on the grounds that the *News*'s links (which reproduced the *Times's* headlines for those rare exclusives) constituted copyright infringement. The *Shetland News* had argued in response that hyperlinks could not constitute infringement, because free access constituted the basic principle of the Internet. But, the Court of Sessions in Edinburgh, by Lord Hamilton, disagreed. The court granted the *Times* an interim interdict (comparable to our preliminary injunction) preventing the *News* from making further hyperlinks.[42] Among other things, the court noted that the *News*'s hyperlinks to certain of the *Times*'s stories permitted readers to get access to the *Times*'s stories while "by-passing the [*Times*] front page and accordingly missing any advertising material which may appear on it." This potential advertising loss figured heavily in the court's decision in favor of the interim relief:

> The balance of convenience clearly, in my view, favored the grant of the interim interdict .... It was fundamental to the setting up by the pursuers of their web site that access to their material should be gained only by accessing their web directly. While there has been no loss to date, there is a

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[41] "The Shetland News Appeal Fund," *Shetland News*, Nov. 11, 1996, formerly posted at www.shetland-news.co.uk/appeal.html.

[42] *The Shetland Times Ltd. v. Dr. Jonathan Wills & Zetnews, Ltd.* (1996) Outer House Cases (Court of Session, Edinburgh, Oct. 24, 1996) (available on LEXIS).

> clear prospect of loss of potential advertising revenue in the foreseeable future.[43]

This interim ruling was appealed, and although the *News* made a worldwide appeal for assistance through its web site, ultimately the case was settled shortly before a scheduled further hearing. The settlement permitted the *News* to link to the *Times*'s page, but specified that the links would clearly identify the *Times* as the originator of the linked stories.[44] Essentially, the parties negotiated a linking license.

2. Other Copyright Claims Based on Linking

Other cases similar to the *Shetland News* case have been threatened. In New Zealand, the editor of the *7am Weekly News* web site has reported that a rival publication, the *Nando Times*, apparently basing its claim on copyright, has demanded payment for the *News*'s use of the *Times*'s headlines and for the right to lind to the *Times*'s site[45] Similarly, News International Newspapers, the owner of *The Times* of London, has threatened an Internet news service, News Index, claiming that its listing of *Times* headlines infringes British copyright law.[46]

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[43] *Id.*

[44] "Shetland Times Internet case settled out of court," *The Shetland News*, http://www.shetland-news.co.uk/headline/97nov/settled/settled.htm/.

[45] Bruce Simpson, "Online News publisher demands money for headlines and links, *Daily Aardvark*, Feb. 5, 1988, www.aardvark.co.n2./n323.htm.

[46] Courtney Macavinta, "Is linking a copyright violation?" Dec. 11, 1997 *available at* www.news.com/NewsItem/Textonly/0,25,17233,00.html.

New web browsers and linking technologies may raise more complicated copyright issues than those raised in the *Shetland News* case. "Framing" technology and "inline" linking technology,[47] for example, may permit a web publisher to display images or other content from another site, as if that content were maintained on the publisher's own site.[48] In one case, a fan's use of inlined links to Dilbert comic strip images led to a cease-and-desist demand by the company holding rights to the images.[49] As browsing technology develops, and as users get faster web access, other web page display and browsing technologies (particularly involving audio, music and other multimedia outputs) are likely to raise copyright infringement claims.

Under current copyright law, almost any artistic or linguistic composition which may be posted on a web site is likely to be copyrighted, meaning that the copyright owner has the exclusive rights to reproduce, distribute and display the work.[50] Could not the linker's use of browser technology to display the work on his or her web page constitute at least infringement of the display right, if not the reproduction and distribution rights as well? Or is that act no different in kind from the viewing that the copyright owner clearly invited and permitted by his posting?

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[47] Inlined images are graphics that are visible on screen as part of a web document's main body (*i.e.* not in a separate frame) but which originate outside the document's hypertext markup language (HTML) code. *See* Richard Raysman & Peter Brown "Dangerous Liaisons: The Legal Risks of Linking Web Sites," N.Y.L. J., Apr. 8, 1997.

[48] *See* "'Framing' Muddles Issue of Content Ownership; Technology Lets Sites Alter Presentation of Others' Web Pages," *Wall Street Journal*, Jan. 30, 1997.

[49] *See* correspondence archived at www.cs.princeton.edu/~dwallach/dilbert.html.

[50] 15 U.S.C. § 106 (exclusive rights of copyright owner).

The copyright owner's right to create derivative works, in particular, is arguably infringed by inlining or framing, and by other compilations of pre-existing works. Derivative works are adaptations—new works created out of pre-existing ones. Because pre-existing content is an essential ingredient of the new work, the creator of the new work must generally obtain permission of the owner of the original work. Many Internet works can raise derivative works issues—everything from artistic compilations to summaries of textual works found elsewhere on the network. In one situation raising a derivative work claim based on framing, the court in an initial decision refused to dismiss the claim, noting that the issue was novel and that the most analogous cases shed little light on the issues.[51]

Whatever the resolution of these issues, use of the framing and inline linking technologies to create composite web pages is likely to raise more difficult copyright infringement issues than simple direct hyperlinks like those involved in the *Shetland News* case.

3. Misappropriation Based On Unauthorized Framing—The *Total News* and *TicketMaster* cases.

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[51] *Futuredontics Inc. v. Applied Anagramics Inc.*, 1998 U.S. Dist. LEXIS 2265, 45 U.S.P.Q.2d 2005 (C.D. Calif. Jan. 30, 1998). *See also* "Web Site 'Framing' Not Likely to Create A Derivative Work of the Web Site, Court Says," 3 BNA Elec. Comm. & L. Rep. 289 (1998).

The combination of hyperlinks and framing technology led to two early 1997 hyperlink cases that raised intriguing business law and intellectual property issues. Framing, as noted, is a method of arranging and viewing web pages that new-generation web browsers introduced to Internet users in 1996.[52]

In *Washington Post Company v. Total News Inc.*,[53] the *Washington Post* and several other major publishers asserted a variety of theories against Total News, Inc., the operator of an independent gateway to the Internet news pages operated by the plaintiffs and others. Among other things, the plaintiff publishers complained that when a web surfer used the Total News site to explore news sites, the news sites (for example, the main news page of the *Washington Post*, or news pages offered by other plaintiff publishers such as Time Inc., CNN, and Dow Jones) would appear "framed" within the advertising-filled borders of the Total News site. By so framing the news sites, the plaintiff publishers alleged, Total News often cut off from the readers the advertisements, banners and Internet addresses of the publishers, and covered them with Total News's banners and advertising. The complaint alleged that these practices were actionable as common law misappropriation, federal and state trademark dilution, unfair competition, trademark infringement, copyright infringement, and tortious interference.

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[52] "Framing" refers to the technical capability to divide a browser window into multiple, independently scrollable frames with different layouts, and to place separate documents, from different Internet sources, in each window.

[53] 97 Civ. 1190 (PKL) (S.D.N.Y. filed Feb. 20, 1997).

As the plaintiffs' Complaint made clear, the hyperlinks *per se* were not the problem. Rather, plaintiffs complained of the *way* Total News orchestrated the links: when a link was clicked by the user, the user would not receive the linked site in its totality but rather would see the linked site *within a Total News frame*. This gives the user something different than he or she would encounter by seeking that site directly, or linking to it from a normal nonframed hyperlink. Most importantly to the plaintiffs, the *Total News* site blocked out what was most valuable to the plaintiffs—the banner advertisements on their pages. Nor surprisingly, *Total News'* banner advertisement was plainly visible. Pointing to this advertising blocking, plaintiffs claimed that *Total News* operated a "parasite site" that diverts" and "free-rides" on plaintiffs' good will:

> Simply put, Defendants are engaged in the Internet equivalent of pirating copyrighted material from a variety of famous newspapers, magazines, or television news programs; packaging those stories to advertisers as part of a competitive publication or program produced by Defendants; and pocketing the advertising revenue generated by their unauthorized use of that material. As explained below, just as that conduct would not be tolerated in the world of print and broadcasting, it is equally unlawful in the world of "cyberspace."[54]

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[54] *Id.*, Complaint, ¶ 10.

The *Total News* case was settled in June 1997, only four months after it was filed, with an agreement that recognized a new Internet property right—the linking license. In the settlement, Total News was required to obtain from the Washington Post and other publisher plaintiffs licenses authorizing the hyperlinks that Total News had previously set up without authorization. Additionally, Total News was required as a condition of the license to display the linked materials only in certain ways—for example, without deleting any text, graphics or advertising, and without "framing" the linked site with Total News's logo or advertising.[55] Some related cases and claims, including a few involving some of the plaintiffs in the *Total News* case, are proceeding.[56]

In a similar case, *TicketMaster Corp. v. Microsoft Corp.*,[57] a ticket-selling agency has complained about a city guide's unauthorized hyperlink to its site because the link enabled Internet users to bypass the agency's "front door" (which contained paid advertising) and proceed directly to a page that contained event and ticket information (and was free of advertising). TicketMaster alleged that by offering this bypass, Microsoft's "Seattle Sidewalks" service was "in effect, committing electronic piracy." TicketMaster claimed that unless it controlled "the manner in which others utilize and profit from its propriety services" it would face the prospect of a feeding frenzy diluting its content." It alleged that the bypass hyperlink constituted trademark dilution and unfair competition.[58]

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[55] *Id.*, Stipulation Order of Settlement and Dismissal, June 6, 1997, *available at* www.ljx.com/internet/totalse.html.

[56] The Los Angeles Times has complained of similar practices by other web sites, including Lycos Guides, Free Republic, and Web TV. *See* Steve Outing, "LA Times Doesn't Want to Be Framed," *Editor & Publisher Interactive*, Nov. 19, 1997. And other news organizations have complained of framing by Total News. *See* Martha L. Stone, "News Sites Go After Framers," *ZDnet*, Dec. 20, 1997, www.zdnet.com/zdnn/content/1220/265686.html.

[57] No. 97-3055 DDP (C.D. Calif. filed April 28, 1997)

Notably, the *Total News* and *TicketMaster* cases involve commercial activity on both sides. In a non-commercial context, there may well be a stronger First Amendment right to make a hyperlink and even to use another's trademark in a hyperlink. In *American Civil Liberties Union of Georgia v. Miller,*[59] where the Court indicated that a ban on non-commercial use of trademarks would raise First Amendment problems, the Court nonetheless stated in dictum that use of trademarks in connection with hyperlinks was allowable.[60]

Because of the economics of web page advertising, "framing" situations like that in the *Total News* case are likely to be fought by the Internet publishers whose content is framed by another. Banner advertising is a significant source of revenue for some commercial web pages, and is expected to growing importance as the web grows. Moreover, many banner advertising contracts are written so that costs are related to the number of "hits" on a page; to the extent other linking pages siphon hits off of a page that carries advertising, the owner of the original page is likely to seek to restrain the unauthorized linking page.[61]

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[58] *Id.*

[59] 43 U.S.P.Q.2d 1356, 25 Media L. Rptr. 1978 (N.D. Ga. 1997).

[60] *Id.* at fns 5 & 6.

Contractual strategies like the *Total News* settlement may well emerge as the prevailing solution to linking controversies, particularly where framing is potentially involved.[62] Whether or not linking licenses like the one created by the *Total News* settlement become the norm, however, the *Total News* and *TicketMaster* cases signal that framed hyperlinkages between business Internet sites can lead to serious unfair competition disputes. The early settlement of the *Total News* case indicates some weakness in the position of the framer, but the legal theories and doctrines that will resolve those disputes remain unsettled in early 1998.

For example, will courts view the gist of an unauthorized hyperlinking case as a third party's use of the publisher's *trademarks* (or, as in the *Shetland News* case, headlines) as the hyperlink buttons? Is the nub of such a case, rather, the presentation of the publishers' *copyrighted content*, framed by the intermediary's banners, and whether that framing constitutes an unauthorized and infringing derivative work? Should courts apply here the specialized doctrine of misappropriation of "hot news"?[63] Or, more likely, is the business of framing and linking to someone else's content an instance of *business competition* to be judged under the general law of unfair competition, including "passing off" and interference with business expectancies? These issues, and the broader policy issue of whether a commercial Internet publisher will be permitted to attract users and advertisers by essentially providing easy links to the content of others, are likely to be vigorously litigated in the future.

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[61] Web publishers who sell advertisements on their pages may attempt to minimize harm from framing by negotiating advertising charges based on total number of hits, regardless of whether the hits go directly to the publisher's home page—but if unauthorized framing becomes more prevalent, advertisers may not agree to such a fee structure.

[62] A committee of the American Bar Association has published a book titled *Web–Linking Agreements: Contracting Strategies and Model Provisions. See* text at note 80 *infra."*

4. Metalinks As Passing Off and Unfair Competition—the *Oppendahl, Playboy, Insituform, AisaFocus* and *Terri Wells* Cases

Metalinks are codes embedded in a web page which essentially act as bait for the indexes created by web search engines. In a "hidden metalink" case, an Internet publisher who wishes to attract viewers embeds another company's trademark in its page as a "metatag." A metatag is essentially invisible computer code which can be read and understood by search engine software as regular text. If an infringer's web site contains the word "Star Wars" repeated thousands of times in metatag code, for example, its site will rank high in response to a viewer's search which seeks Star Wars-related sites.

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[63] *See International News Service v. Associated Press*, 248 U.S. 215 (1918).

Because bad intentions suggest an intent to mislead and benefit from the goodwill associated with another's trademarks, cases involving suspicious or deceitful conduct often present the clearest cases of infringement. For this reason, several of the early "hidden metalink" situations presented relatively easy cases for courts, and led to quick injunctive orders for the plaintiffs. But one early metalink case also demonstrated that even use of another's trademarks in a hidden metalink can, under some circumstances, constitute allowable descriptive use.

In one case, the hidden words identified a patent law firm, Oppendahl & Larson, so when a user searched for that firm, the search results featured instead the defendant's web sites. The Oppendahl firm sued in July 1997, alleging unfair competition, violation of the federal trademark dilution statute, and trademark infringement.[64] Permanent injunctions were entered six months later with the consent of all defendants that had appeared.

In a similar case, Playboy Enterprises sued two firms that embedded the hidden words "playboy" and "playmate" on their sites. In the first case, Playboy sued in late August 1997 and obtained a preliminary injunction on September 8, 1997.[65] In the second one, *Playboy Enterprises, Inc. v. AisaFocus International. Inc.*,[66] a trial judge held that defendant's metalink use of various Playboy-owned trademarks constituted "deceptive tactics" which warranted severe sanctions. Although the defendants used Playboy's trademarks in various ways, the use of the marks in hidden metalinks was central to the defendants' deceptive scheme, and greatly influenced the court:

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[64] *Oppendahl & Larson v. Advanced Concepts*, No. 97-2-1592 (D. Colo. July 23, 1997), *available at* http://www.patents.com/ac/complain.sht.

[65] *Playboy Enterprises, Inc. v. Calvin Designer Label*, 44 U.S.P.Q.2d 1156 (N.D. Calif. 1997).

> Specifically, the defendants embedded PEI's trademarks "playboy" and "playmate" within the Web sites' computer source code which is visible to "search engines" that look for Web sites containing specific words or phrases specified by computer users. Thus, a consumer conducting a search for PEI's Web site by typing in the trademark "Playboy" or "Playmate" would receive a search engine-generated list which would include the aisan-playmates Web site. Through the defendants' willful deception, consumers have been misled into believing the aisan-playmates Web site is connected with, or somehow sponsored by, PEI.[67]

The court found willful infringement and imposed statutory penalties of $3 million on the defendants.

Similarly, in *Insituform Technologies Inc. v. National Environtech Group, L.L.C.*,[68] the plaintiff complained of its competitor's use of its trademarks INSITUFORM and INSITUPIPE as metatag keywords. The case was settled with a final judgment on consent less than two months after filing. The consent judgment required, among other things, that the defendant formally resubmit its web pages to five major search engines after the offending metatags were deleted, to assure that the misleading key words were promptly removed from search engine databases.[69]

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[66] ___ F.Supp. ___, No. 97-734-A (E.D.Va. April 10, 1998).

[67] *Id*. (record citations omitted).

[68] Civil No. 97-2064 (E.D. La. Filed July 1, 1997).

One may, of course, exploit the quirks of search engine technology without clearly infringing another's trademark. For example, there appears to be nothing wrong with using someone else's trademark in regular (non-hidden) text, so long as it is clear that the user is not authorized or related to the trademark owner (*i.e.*, no trademark dilution). This was illustrated, somewhat humorously, by a web author who, as a follow-up to the *Oppendahl* case, published his own page repeatedly disavowing any connection with the firm.[70] Because it used the firm's name so often, it ranked high in searches for the firm—but because of the non-hidden and factual context of the use of the words, the firm did not view it as infringement. In the same manner, a business could openly use its competitor's name on its web site, perhaps in making product comparisons; in such a case, the site might attract viewers who were looking for the competitor's site but this situation would present a markedly different situation from the hidden metalink cases.

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[69] Final Judgment on Consent Against Defendant National EnviroTech Group, L.L.C., Civil No. 97-2064 (E.D. La. Aug. 26, 1997), available at www.cll.com/case1.htm.

[70] www.geocities.com/CapitolHill/Lobby/6620/index.htm.

Nor is use of a trademark forbidden even in hidden metalinks if it is not likely to confuse a consumer as to source. Hence Playboy Enterprises' suit against Terri Welles (who had been its "Playmate of the Year" in 1981), complaining of her use of "playmate" and related terms as metalinks, was unsuccessful at the preliminary injunction stage. The court found that because Ms. Welles had indeed been named a "playmate," her use of the term to attract Internet viewers was not deceptive.[71]

5. Contributory Infringement Claims Arising from Links and Mirror Sites

In mid-1997, several British journalists posted on the World Wide Web an official government report which analyzed the response to Nottinghamshire County officials to claims of Satanism and child abuse. The report, by a Joint Inquiry Team, essentially concluded that officials overreacted to bizarre and incredible claims. The posting of the report on the Internet, and the County council's reaction to that posing, spawned yet another controversy, and to some eyes, another example of government overreaction.

The county council first sought an injunction against the journalists who had posted the report. As owner of the copyright on the report, the county council claimed copyright infringement, and because the journalists had posted the report verbatim, the court readily granted an injunction. The journalists then posted links to

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[71] *Playboy Enterprises Inc. v. Welles*, No. 98-CV-0413-K (JFS) (S.D. Cal. April 22, 1998).

"mirror" sites—that is, other Internet sites whose operators had downloaded and reposted the report. The county council then sought, and obtained, an injunction prohibiting the defendants from posting those links to mirror sites.

Although the county council had moved first against the journalists who initially posted the report, the speed of the Internet frustrated the county council's attempt to keep the inquiry report secret, as one report noted:

> [T]he network [The Internet] has almost entirely negated the council's attempt to control the leak. By the time the document was removed from British sites, it had already zinged its way around the globe. Sites in Belgium, Canada, and the United States mirrored it in full almost as soon as it appeared.[72]

The "mirror" sites, in particular, negated the effectiveness of the injunction, since the mirror sites were freely accessible to all Internet users even after the original unauthorized posting was shut down. And because many of the mirror sites existed on services outside the United Kingdom, the enforcement difficulties were multiplied.

The county council tried to shut down mirror sites even outside of Britain. A mirror site operator in Canada responded to the threats by shutting down both his mirror site and his links to other mirror sites. But a law professor and activist for Internet and computer user rights in the United States defied the county council's demands, claiming that it had no jurisdiction over him, and arguing in addition that the county council's suppression efforts were counterproductive and wrongheaded and that posting of the report might be protected as "fair use."[73] Eventually, the county council gave up its attempts to restrain linking and mirror sites.[74]

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[72] Ashley Craddock, "Little Pig, I'll Blow Your Site Down," *Wired News*, June 13, 1997, www.wired.con/news/topframe/4418/html.

Although this incident resolved little, it highlights how Internet copying (such as creation of mirror sites) and linking (such as links to allegedly infringing sites) may give rise to contributory infringement claims. The Nottinghamshire authorities expressed the certainty of their conviction that both activities were actionable: "For the avoidance of doubt the copying of the report or any hypertext links on this Internet website is an infringement of copyright."[75] In cases where the defendant is more easily brought before a court, and particularly where the mirror site operator has copied materials with knowledge that they were copyrighted, courts may well agree with this position.

6. Possible Passing Off, Tarnishment and Disparagement Claims

The tort of "passing off" played a significant role in several of the hyperlink cases to date. This tort addresses a key concern of businesses that is raised by many linking situations—the extent to which one business firm's reputation is appropriated or misused by another. Linkages may cause "passing off" concerns if one firm by its links suggests that its goods or products are those of a better regarded competitor. Linkages may also lead to the relatively unusual "reverse passing off" claim in which one firm attempts to suggest that another's goods are its own—for example, if an Internet publisher were to use a linkage to suggest that it was responsible for the highly regarded goods or services on a competitor's page to which it linked.

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[73] Exchange of Correspondence, C.P. McKay, Nottinghamshire County Solicitor to Professor Peter Junger, June 11, 1997, and Professor Peter Junger to C. P. McKay, June 16, 1997, *available at* www.xs4all.nl/~yaman/jetusa.htm.

[74] Ashley Craddock, "Nottingham v. Net: Game, Set, Match to Net," *Wired News*, Aug. 4, 1997, www.wired.com/news/politics/story/5763.html.

[75] C.P. McKay e-mail to Peter Junger, June 11, 1997, note 73 *supra*.

We may envision many situations in which linkages give rise to different kinds of passing off and reverse passing off claims. The use of logos and trademark designs in Web pages presents one of the obvious problems. An Internet page creator who wants to link to the Walt Disney Company's official pages or fan pages,[76] and who creates a Mickey Mouse icon for its hyperlink, may well receive a cease-and-desist letter from Burbank, California. Owners of valuable trademarks are likely to view hyperlinks as more likely to create a "passing off" problem than non-hyperlink use of a trademark, particularly where famous design marks are used. As an example of reverse passing off, a company that manufactures or distributes low-quality goods could seek to upgrade its image in the marketplace (and possibly pass its goods off as associated with better-known producers) by hyperlinking to sites for top-quality producers.

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[76] Fan pages are pages established by fans of entertainers devoted to information, tributes and discussion concerning the entertainer. *See generally* Ericka S. Koster and Jim Shatz-Akin, "Set Phasers on Stun: Handling Internet Fan Sites," *Computer Lawyer*, Jan. 1998 at 18.

These and similar situations may also raise concerns about tarnishment or disparagement of one's business reputation because of unwelcome associations. If Joe's Internet Home Page for Junk Goods contains a hyperlink to your page, for example, your goods may be implicitly disparaged, and your trademarks tarnished, by the association of the client's goods with "junk."

7. Possible Negligence Claims

Hypertext links may create problems even for Internet advertisers with the best of intentions—for example, where one party's Internet page links to a source which was considered reliable, but which turns out to contain misleading or harmful information. Even such simple informational linkages (posted with no particular commercial purpose other than to help provide information to consumers) could create risks under the theory of "negligent publication." The "negligent publication" theory is disfavored and usually rejected as a matter of tort and constitutional law.[77] However, extensive use of linkages to other sites in the "chaotic" and uncontrolled Internet may raise judicial eyebrows. Prudent web publishers, moreover, confront a dilemma as to the extent of their monitoring of linked sites; if they conduct extensive checking, they may be deemed under negligence law to have assumed the obligation to verify linked sites, whereas if they do not check, they may be charged with reckless linking.[78]

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[77] *See* Sandra Davidson, "Blood Money: When Media Expose Others to Risk of Bodily Harm, 19 HASTINGS COMM/ENT L. J. 225 (1997).

C. Defenses and Defensive Strategies For Hyperlink Claims

In 1996, when his rival raised legal objections to his hyperlinks, Dr. Wills of the *Shetland News* could be forgiven for his incredulity at the claim, and his "choking back tears of mirth" response. Such a response, however, will soon lack credibility. Increasingly, Internet publishers should understand that links on or to business sites may raise claims, and they should be prepared with strategies for preventing or minimizing such claims, or with defenses to them. Several such possible defensive strategies are outlined below.

1. Permission Agreements

The simplest and most direct way to prevent claims of unauthorized hyperlinks is to obtain authorization. Often this will be quite easy to accomplish. Some web sites solicit or encourage links, and even make readily available art work which can be downloaded to serve as the linking symbol; obviously such sites permit linking, and no further permission is required. Other sites may generally seek links, but perform some limited screening and approval process. Here, if one follows the approval process, and is allowed to link, authorization is established.

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[78] *Cf. Stratton Oakmont Inc. v. Prodigy Servs. Co.*, 23 Media L. Rptr. 1794 (N.Y. Sup. Ct. 1995) (online service that conducts some screening of content held to have assumed responsibility for content).

Where one finds no "link freely" invitation or link approval process, the linking party can seek authorization in various ways. If a letter to the webmaster of the prospective linkee gets an approval in response, this offer and acceptance through exchange of correspondence should evidence an enforceable linking agreement. If the linkee in response imposes limits or conditions to its linking authorization, then a response from the operator of the linking site will be needed to complete the offer-counterproposal-acceptance cycle. Given the simplicity of even the arms-length settlement agreements in the *Total News* and *Shetland News* cases, a simple exchange of correspondence should suffice for most simple linking authorizations.

Linking licenses may well be come expected where framing or inline technologies are used to specially present or aggregate content from other web sites. In such situations, a prudent web publisher should at least consider obtaining such a license, due to the possible objections and claims, illustrated by the *Total News* and *TicketMaster* cases, which may attend to unauthorized framing. The most complex linking licenses may require significant attention like any other important contract.[79] Indeed, in anticipation of an increasing use of formal linking licenses in situations like this, an American Bar Association subcommittee has published a guide to considerations relating to terms in linking licenses.[80]

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[79] *See, e.g.*, Mark Kaminkey, "Net License: Favored Way to Protect IP," *Nat'l L.J.* Nov. 11, 1996 (describing issues which may be covered in linking licenses).

Linking permission agreements are likely to become more and more common with respect to business sites on the web. They permit businesses to control their gateways to customers and the public, maintain quality and performance standards, and prevent misunderstandings. Eventually, linking rights may become valuable saleable commodities for owners of the most desirable sites.

2. Disclaimers

Web publishers may of course include in their sites appropriate disclaimers and disavowals. For example, one might explain the ownership of trademarks used on a web page, and disavow any affiliation or endorsement by the trademark owners or by operators of linked sites. While such disclaimers are increasingly used, they may not cure appearances of unfair competition created by framing or misleading links. Disclaimers, after all, are usually found in fine print at the bottom of a page (often not visible unless the viewer scrolls down to it), and trademark infringement and unfair competition law tends to focus on overall impressions.[81]

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[80] Interactive Services Subcommittee, Law of Commerce in Cyberspace Committees American Bar Ass'n. Section of Business Law, *Web-Linking Agreements: Contracting Strategies and Model Provisions* (1997).

3. Standard Defenses to Claims

When claims are made based on hyperlinks, the defendants will find some ready-made defenses available. In copyright and trademark law, for example, the defenses of "fair use" (copyright law) and "descriptive" or "non-trademark" use (trademark law) are quite often used as defenses, particularly where the defendant is not a business competitor and has a public-interest justification for using for using a part of another's intellectual property.

For example, a linking page owner may defend against hyperlink copyright infringement claims on grounds of non-copyrightability or fair use. Even if the copy used on the linking page is taken from the originating page, if what is taken is short enough or a mere factual description, it may not constitute infringement. In the *Shetland News* case, for example, the *News* claimed that the *Times* headlines that it copied onto its page were too short to be copyrightable. Fair use is a complicated issue in United States law, but the flexible statutory fair use factors,[82] the "transformative use" factor introduced by *Campbell v. Acuff-Rose Music Inc.*,[83] and the holding the *Sony Betamax* case,[84] which approved massive viewer-initiated time-shifting transfers for personal use, may support the defense in this context.

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[81] *American Chicle Co. v. Topps Chewing Gum, Inc.*, 208 F.2d 560, 562 (2d Cir. 1953) (L. Hand, J.) (in trademark law, courts consider habits of buyers including their tendency to quickly glance at package labels without carefully studying them).

[82] 17 U.S.C. § 107.

A similar defense in trademark law, variously called the "fair use" or "descriptive use" defense, in essence, forbids a trademark registrant to appropriate a descriptive term for his exclusive use and so prevent other from accurately describing a characteristic of their goods."[85] Particularly where there is no descriptive substitute for a trademark, use of the trademark will not imply sponsorship or endorsement of the product where the mark is used only to describe the thing, rather than to identify its source. For example, although "Boston Marathon" is a trademark, a television station could not be stopped from using the name "Boston Marathon" because those words described the event that the station broadcast.[86] As one court put it:

> Such *nominative use* of a mark -- where the only word reasonably available to describe a particular thing is pressed into service -- lies outside the strictures of trademark law: Because it does not implicate the source-identification function that is the purpose of trademark, it does not constitute unfair competition; such use is fair because it does not imply sponsorship or endorsement by the trademark holder.[87]

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[83] 510 U.S. 569 (1994).

[84] *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

[85] *Soweco, Inc. v. Shell Oil Co.*, 617 F.2d 1178, 1185 (5th Cir. 1980).

[86] *WCVB-TV v. Boston Athletic Ass'n*, 926 F.2d 42, 46 (1st Cir. 1991).

[87] *New Kids On the Block v. News America Pub. Inc.*, 971 F.2d 302, 306-08 (9th Cir. 1992).

Whether use of a trademark on a hyperlink is justifiable as a fair and descriptive use of the mark will often depend on whether consumers believe that a trademark hyperlink indicates some sponsorship by, or a recognized or licensed association with, the trademark owner.

4. Right to Hyperlink Defense

Creators and users of hyperlinks can claim that web traditions and practices have given rise to an implied license to link—as it is sometimes characterized, an implied right of public access. For example, a British professor offered a custom-based argument in favor of the *Shetland News*'s hyperlinks:

> The copyright owner made a deliberate choice to place his web site online, with full knowledge (presumably) of how the system operates. Linking of web sites to one another is extremely common and is, arguably, both the *raison d'etre* of the www and the reason for its success. It is custom and practice, and so if a copyright owner puts up a web site, he must expect others to link into his site. Services such as web search rights could not operate without this ability.[88]

Similarly, in its Answer to the *TicketMaster* suit, Microsoft asserted the right to hyperlink, but highlighted technology rather than custom as giving rise to the right. In its affirmative defenses to *TicketMaster*'s claims, Microsoft first explained web pages and hyperlinks, emphasizing that web page publishers invite the public to view their sites, and that hyperlinks merely facilitate that activity:

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[88] Professor Charles Oppenheim, De Monfort University, "The Internet Copyright Case and its Implications for Users of the WWW," Dec. 6, 1996. *See* http://www.shetland-news.uk/editorial/profoppl.html.

> 43. Any business, such as Ticketmaster, participating in the Internet and the World Wide Web invites other participants to use the business' Internet addresses and URLs to contact it.
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> ***
>
> 45. Microsoft does not use Ticketmaster's Web Site. Microsoft does not access, incorporate or redistribute Ticketmaster Web Page documents. All Microsoft does is provide viewers of its own Web Pages with the URLs for other Web Page on the Internet, including some operated by Ticketmaster, that the viewer may find of interest. Whether or not the viewer accesses a Ticketmaster Web Page document is up to the viewer. Whether or not Ticketmaster displays the Web Page document to the viewer is up to Ticketmaster. Microsoft is not a party to the communication between the viewer and Ticketmaster.
>
> ***
>
> 47. Any actual linkage complained of by Ticketmaster in its Complaint and First Amended Complaint occurred because Ticketmaster intended it to occur.[89]

To oversimplify somewhat, Microsoft claimed that links on its "Seattle Sidewalks" site to the TicketMaster site were no different from footnotes or directory listings in print, which scholars and newspapers are free to publish, and which have an effect, if at all, only through the independent actions of readers.

Based on these facts, Microsoft alleged as affirmative defenses, among others, (a) that TicketMaster assumed the risk "when it elected to participate in the

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[89] Microsoft Corporation's Answer to First Amended Complaint, Affirmative Defenses and Counterclaims, ¶s 43, 45 and 47, *TicketMaster Corp. v. Microsoft Corp.*, No. 97-3055 DDP (C.D. Calif. May 28, 1997).

World Wide Web system" that Internet users would view its site, (b) that because TicketMaster encouraged traffic to its site, it was estopped from making claims based on that traffic, and (c) that Microsoft's use of TicketMaster's trademarks was fair non-commercial use, devoid of any suggestions of sponsorship or endorsement.[90] Finally, Microsoft claimed that its use of TicketMaster's trademarks, and its "publication of basic information and commentary about TicketMaster" constituted "news reporting of information, and "constitutionally protected speech," which could not constitutionally be enjoined.[91]

Whether based on custom or technology, "implied license" or "implied public access" theories may be dependent to a great extent on the evidence regarding actual web practices. In particular, if web publishers begin incorporating in their pages prohibitions against linking, or if they begin requiring prior consent to linkages, those practices would seriously undercut the implied license or consent arguments. And in instances where the linking site does more than just provide a neutral link—for example, where, as alleged in *Washington Post Company v. Total News Inc.*, the linking site frames the linked material with its own banners and advertisements—it would be harder to justify a right to freely link.

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[90] *Id.*, ¶s 51-62.

[91] *Id.*, ¶s 61-62; 71-75.

Similarly Microsoft's proposed "news reporting" and "commentary" First Amendment defenses will depend upon the facts. Commercial speech is afforded significantly less First Amendment protection than non-commercial speech.[92] If a linker's web site is viewed as commercial competition to the linkee's offering, courts are unlikely to bar business unfair competition claims, or hold that otherwise improper conduct is privileged under the First Amendment.

Conclusion

Every Internet user understands the delight that Berners-Lee and other technological pioneers must have felt with the creation of hypertext markup language, the World Wide Web, and quick and easy hyperlinks. The technology is truly revolutionary and holds great promise for increasing communication, learning, and the speed and reach of business activity.

Business users of the World Wide Web, however, also understand technological laws, and in particular one immutable principle that applies not only to technology but to all human affairs: *One thing leads to another.* When one thing (including a hyperlink) leads to another (such as a copyright or trademark infringement, a false or misleading reference, or a misappropriation of a business opportunity), our law comes into play. Where there are legal prohibitions against certain kinds of associations, the law will stand in the way of unlimited linking, no matter what the preference of the technology enthusiasts. Put simply, the millions of hyperlinks created on the World Wide Web are not just linked to web sites and one another. They are also linked, inextricably, to the laws that regulate business activities.

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[92] *Central Hudson Gas & Elec. Corp. v. Public Service Commission*, 447 U.S. 557 (1980).

Bits, Bytes and the Right to Know: How the Electronic Freedom of Information Act Holds the Key to Public Access to a Wealth of Useful Government Databases

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Introduction

After five years of congressional hearings, floor debates and compromises,[1] the Electronic Freedom of Information Act Amendments (EFOIA)[2] became law on October 2, 1996.[3] Congress enacted the EFOIA, which amended the Freedom of Information Act of 1966 (FOIA),[4] for two principal reasons. First, Congress wanted to clarify that the federal disclosure statute applied equally to agency records maintained in electronic formats as well as to paper formats.[5] Second, Congress wanted to make a number of administrative and procedural changes to help ease serious delays and backlogs in government responses to FOIA requests.[6] In June 1996, for example, the FBI had a 4-year-backlog in responding to FOIA requests.[7]

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[1] In 1991 Sen. Patrick Leahy introduced the Electronic Freedom of Information Improvement Act. *See* Senate Hearing Before the Subcommittee on Technology and the Law of the Committee on the Judiciary. *See* S. REP. No. 1940, 102nd Cong., 2nd Sess. (1992); *See also* H.R. REP. No. 795, 104th Cong. 2nd Sess. 14 (1996).

[2] *See* Pub. L. No. 104-231, 110 Stat. 3048, §§ 1-12 (1996)(codified as amended in various sections of 5 U.S.C. § 552).

[3] On September 20, 1996, Congress presented the Electronic Freedom of Information Act Amendments to President Clinton for his signature. He signed the bill into law on October 2, 1996.

[4] *See* 5 U.S.C. § 552 (1994).

[5] *See* H.R. REP. No. 795, 104th Cong. 2nd Sess. 11.

The purpose of this paper is to shed light on the goals and implications of one of the EFOIA's key electronic provisions, Section 3.[8] According to a 1996 House report[9] that accompanied the legislation, one of this section's purposes was to explicitly reject a 1976 definition of "agency records" used by the U.S. Court of Appeals for the Ninth Circuit in *SDC Development Corp. v. Mathews.*[10] In *SDC v. Mathews*, the Ninth Circuit held that a widely used medical database compiled and stored in a computer data bank by a federal agency did not qualify as an "agency record" for the purposes of the FOIA.[11]

The implications of this provision need to be examined for several reasons pertaining to important issues of access, federal information dissemination and economics. First, the federal government is increasingly involved in the gathering, storage and manipulation of information in electronic form and digital formats, including the creation of databases.[12] Second, both profit-making and nonprofit organizations request government-held information for a variety of uses, including dissemination to other users.[13] Third, government information stored electronically is potentially far more valuable than the equivalent data on paper because information in electronic formats can be used and manipulated faster, easier and at less cost.[14] In sum, the EFOIA's electronic provisions are tremendously important to the future of public access to government-held information in the electronic age.[15] If effective, this statute can help keep the government from restricting access to electronically recorded information and

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[6] *See Id.* at 13-14.

[7] *See Id.* at 16, *citing* statement of U.S. Rep. Steven Horn at a hearing on federal information policy before the Subcommittee on Government Management, Information and Technology of the Committee on Government Reform and Oversight, June 13, 1996.

[8] *See* Pub. L. 104-231, 110 Stat. 3048, 3049, § 3 (1996)(codified as amended in subsection (f) of 5 U.S.C. § 552). Section 3 is entitled *Application of Requirements to Electronic Format Information.* The EFOIA comprises 12 sections in all, 10 of which directly or indirectly address issues pertaining to the recording, storage and disclosure of electronic records. *See Id.* §§ 1-6 and §§ 9-12. Sections 7 and 8 concern administrative and procedural changes that deal with delays in processing FOIA requests and backlogs. *See Id.* §§ 7, 8 (codified as amended in subsection (a)(6) of 5 U.S.C. 552). These two sections are beyond the scope of this analysis.

[9] *See* H.R. REP. No. 795, 104th Cong. 2nd Sess. 20.

[10] 542 F.2d 1116 (9th Cir. 1976). The appellant, F. David Mathews, was Secretary of Health, Education and Welfare.

[11] *Id.* at 1120-21.

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[12] *See* Management of Federal Information Resources Notice, § 7a, 59 Fed. Reg. 37,906, 37,910 (1994)(Circular A-130). *See* Matthew D. Bunker, Sigman L. Splichal, Bill F. Chamberlin and Linda M. Perry, *Applying Legal Doctrine to Emerging Technology*, 20 FLA. ST. U. L. REV. 543, 559-60, 1993.

[13] *See generally Creative Ways of Using and Disseminating Federal Information: Hearings Before the Government Information, Justice and Agriculture Subcommittee of the House committee on Government Operations,* 102d Cong., 1st & 2d Sess. (1992).

[14] *See* Robert M. Gellman, *Twin Evils: Government Copyright and Copyright-like Controls Over Government Information*, 45 SYRACUSE L. REV. 999, 1003, 1036 (1995); Henry H. Perritt, Jr., *Unbundling Value in Electronic Information Products: Intellectual Property Protection for Machine Readable Interfaces,* 20 RUTGERS COMPUTER & TECH. L.J. 415, 418-22 (1994); Leo T. Sorokin, *The Computerization of Government Information: Does It Circumvent Public Access Under the Freedom of Information Act and the Depository Library Program?* 24 COLUM. J.L. & SOC. PROBS. 267, 277 (1991).

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also undercut efforts to establish information monopolies.[16] As the Department of Justice observed, "no development in the history of the Act has held as much potential for shaping [the FOIA's] contours, even the very future of its implementation, as that of new technology."[17]

The general research question this paper tries to answer is: What are the implications of EFOIA Section 3, the electronic provision that Congress crafted to reject the ruling in *SDC v. Mathews*? Two important corollary queries flow from this broad central question. First, does EFOIA Section 3 prevent the government from selling -- or at least recovering its costs of producing -- databases compiled by federal agencies? Second, what is the practical effect of EFOIA Section 3 in light of the 1989 U.S. Supreme Court decision in *U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press*?[18] There seems to be a conflict between the congressional intent behind Section 3[19] and the Supreme Court's seminal ruling in *Reporters Committee*.[20]

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[15] *See* FOIA UPDATE, VOL. XI, No. 2, at 3, Spring/Summer 1990.

[16] Law Professor Henry H. Perritt Jr. wrote that the Freedom of Information Act is an "instrument of the diversity principle. It undercuts efforts to establish information monopolies because it grants private sector redisseminators an entitlement to public information notwithstanding agency efforts to block access in order to support exclusive distribution arrangements." HENRY H. PERRITT, JR., LAW AND THE INFORMATION SUPERHIGHWAY 477 (1996).

[17] *See supra* note 15.

[18] *See* 489 U.S. 749 (1989).

[19] *See* H.R. REP. No. 795, 104th Cong. 2nd Sess. 20 (1996).

[20] *See* 489 U.S. at 772-74 (holding that the disclosure of computerized FBI compilations of an individual's criminal records is an unwarranted invasion of privacy under FOIA

The House report accompanying the EFOIA said information an agency has created and is directly disseminating remains subject to the FOIA in any of its forms or formats.[21] But according to the *Reporters Committee* opinion, public access to government information under the FOIA is limited to only "official information that sheds light on an agency's performance of its statutory duties."[22]

To gain some insight into these questions, this paper will discuss the background of the Freedom of Information Act in Part I. Part II will outline the EFOIA in general, and Part III will examine Section 3 and analyze *SDC v. Mathews*. Part IV will discuss the economic implications of EFOIA Section 3. Finally, Part V will explore the implications of the *Reporters Committee* decision.

Part I: The Freedom of Information Act

An understanding of the FOIA's legislative history and historic roots is important because the statute's broad policy of full disclosure[23] is the foundation on which the EFOIA is built. In addition, the Act's legislative history is especially relevant to later parts of this analysis.

Exemption 7(C) when the request does not seek official information that directly sheds light on an agency's performance of its statutory duties.).

[21] *See* H.R. REP. No. 795, 104th Cong. 2nd Sess. 20.

[22] 489 U.S. at 773.

[23] *See* U.S. Dept. of the Air Force v. Rose, 425 U.S. 352, 361 (1976); EPA v. Mink, 410 U.S. 73, 80 (1973).

Passed by Congress in 1966 and subsequently amended in significant respects,[24] the FOIA creates a judicially enforceable policy that favors a general philosophy of full disclosure.[25] The Act applies to "records" held by "agencies" within the executive branch of the federal government,[26] including the Executive Office of the President and independent regulatory agencies such as the Federal Communications Commission, the Environmental Protection Agency and the Securities and Exchange Commission.[27] The FOIA makes agency records available to the public[28] upon request and places the burden of justifying nondisclosure on the government.[29] The FOIA does not include records maintained by state or local governments, by the courts, by Congress or by private citizens.[30]

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[24] Congress revised the FOIA in 1974, 1976 and 1986 before it enacted the electronic amendments in 1996. These earlier amendments will be discussed later in this analysis.

[25] *See* S. Rep. 813, 89th Cong., 1st Sess. (1965), *reprinted in* Freedom of Information Act Source Book: Legislative Materials, Cases, Articles 38, (1974) [hereinafter The FOIA Source Book]. The FOIA Source Book of the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, U.S. Senate, is a primary source for the legislative history of the FOIA. *See also* 425 U.S. at 361. *But see* U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 774-75 (1989)(holding that the "core purpose" of the FOIA is to disclose only those records that directly shed light on the operations of government.)

[26] *See* 5 U.S.C. § 552(f) (1994).

[27] *See Id.*

[28] 5 U.S.C. § 552(a).

[29] *See Id.* § 552(a)(4)(B)(b). *See also* NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 234, 236 (1977); EPA v. Mink, 410 U.S. 73, 79, 87 (1973).

The statute is potentially one of the most valuable tools of inquiry available to journalists and others who want to know what the federal government is doing.[31] For instance, in the months preceding the October 1996 enactment of the EFOIA, records released under the statute revealed FAA actions against Valujet before the May 11, 1996, crash into the Everglades that killed all aboard; the unsafe lead content of tap water in Washington, D.C.; the U.S. government's treatment of South Vietnamese commandos who fought in a CIA-sponsored army in the early 1960s; and the types of tax cases that the IRS recommends for criminal prosecution.[32]

In crafting the Freedom of Information Act, Congress recognized it is crucial for citizens in a democracy to have access to government information in order to make informed decisions.[33] The FOIA prevents politicians and bureaucrats from being the exclusive judges of what the public can know. Congress also recognized that there are rightful reasons to keep some information secret. A 1965 Senate report, which accompanied the original Freedom of Information Act, declared that the public's

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[30] *See* JUSTIN D. FRANKLIN AND ROBERT F. BOUCHARD, GUIDEBOOK TO THE FREEDOM OF INFORMATION ACT 1-24, § 1.03, Mar. 1998.

[31] *See* 142 CONG. REC. S10715 (daily ed. Sept. 17, 1996)(statement of Sen. Leahy).

[32] *See Id.*

[33] H.R. REP. No. 1497, 89th Cong., 2d Sess. (1966), *reprinted in* THE FOIA SOURCE BOOK, *supra* note 25, at 33. "A democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies. ... [The FOIA] provides the necessary machinery to assure the availability of Government information necessary to an informed electorate." *Id.*

statutory "right to know"[34] must be balanced against the government's need to keep some information confidential.[35] For this reason, Congress created nine exemptions, under which federal agencies may refuse to disclose information.[36]

Congress amended the FOIA four times since the law was enacted, in 1974, 1976, 1986 and 1996. A discussion of the amendments that preceded the Electronic Freedom of Information Act Amendments of 1996[37] is relevant to this discussion because the amendments -- especially those approved in 1974 and 1976 -- evinced Congress' intent for the FOIA to represent a broad policy of full disclosure. The FOIA's legislative intent is important to this analysis because the Act's scope and purpose became significant issues in *SDC Development Corp. v. Mathews*[38] and *U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press*,[39] which are examined in Parts III, IV and V.

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[34] The term "right to know" has been attributed to a 1945 speech by Kent Cooper, then Executive Director of the Associated Press. He is also the author of THE RIGHT TO KNOW (1956).

[35] "At the same time that a broad philosophy of `freedom of information' is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files, such as medical and personnel records. It is also necessary for the very operation of our Government to allow it to keep confidential certain material, such as the investigatory files of the Federal Bureau of Investigation." S. REP. No. 813, 89th Cong., 1st Sess. (1965), *reprinted in* THE FOIA SOURCE BOOK, *supra* note 25, at 38.

[36] *See* 5 U.S.C. §§ 552(b)(1-9). Briefly stated, the FOIA does not apply to matters that fall under the categories of (1)classified information and national security, (2) internal agency personnel information, (3) information exempted by other Congressional statutes, (4) trade secrets and other confidential business information, (5) agency memoranda, (6) disclosures that invade personal privacy, (7) law enforcement investigation records, (8) reports from regulated financial institutions and (9) geological and geophysical information.

[37] *See* Pub. L. No. 104-231, 110 Stat. 3048, §§ 1-12 (1996)(codified as amended in various sections of 5 U.S.C. § 552).

Congress amended the FOIA in 1974 with the intention to strengthen the statute because there was a general reluctance by agencies to comply with the law's policy of full disclosure.[40] Federal agencies had been interpreting the exemptions broadly to justify withholding documents, and officials often used various ploys to discourage use of the FOIA, including high fees for copying documents, long delays and claims that they could not find the documents requested.[41] In great part, this state of affairs was the result of sometimes vague or even poor draftsmanship of the FOIA.[42]

The 1974 amendments required agencies to respond to information requests within 10 days or face a lawsuit,[43] and directed each agency to issue FOIA fee regulations for the recovery of only the direct costs of search and duplication.[44] A key revision authorized federal judges to conduct *in camera* review of classified information in order to confirm that the requested materials actually fell within the guidelines of Exemption 1, the national security exemption.[45] Congress revised Exemption 1 in direct response to a 1973 Supreme Court decision in EPA v. Mink.[46] In deciding *Mink*, the Supreme Court interpreted Exemption 1 broadly and held that classified documents were exempt from judicial review.[47] Congress acted to override the *Mink* decision because legislators believed the Court's ruling conflicted with the general philosophy of full disclosure evinced in FOIA.[48]

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[38] *See* 542 F.2d 1116 (9th Cir. 1976).

[39] *See* 489 U.S. 749 (1989).

[40] In a critique of the FOIA, then University of Chicago Law Professor Antonin Scalia characterized the 1966 version of the Act as a "relatively toothless beast, sometimes kicked about shamelessly by the agencies." Antonin Scalia, *The Freedom of Information Act Has No Clothes, in* REGULATION, March/April, 1982, at 15.

[41] *See* ALLAN ROBERT ADLER, LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS 8 (1995).

[42] Criticism of the Act ranged from the subtle -- "hardly . . . the apogee of legislative draftsmanship" -- to the blunt -- "primitive and ineffective." JAMES T. O'REILLY, FEDERAL INFORMATION DISCLOSURE -- PROCEDURES, FORMS AND THE LAW 3-2 (1994).

[43] *See* 5 U.S.C. § 552(a)(6)(A)(i).

In 1976, Congress amended the FOIA for the second time because legislators wanted to clarify Exemption 3. This exemption provided that the FOIA did not apply to information clearly exempted by other laws previously passed by Congress.[49] Legislators revised Exemption 3 to override a 1975 Supreme Court ruling with which Congress did not agree.[50] In *Administrator, FAA*

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[44] *See* H.R. REP. No. 1380, 93d Cong., 2d Sess. 7 (1974).

[45] *See* 5 U.S.C. § 552(b)(1)(B).

[46] *See* 410 U.S. 73 (1973).

[47] *See Id.* at 84.

[48] *See* H.R. REP. No. 1380, 93d Cong., 2d Sess. 11-12 and S. REP. No. 1200, 93d Cong. 2d Sess. 12 (1974).

[49] *See* 5 U.S.C. § 552(b)(3).

[50] *See* Administrator, FAA v. Robertson, 422 U.S. 255 (1975).

v. Robertson,[51] the Court held that the FAA administrator possessed wide discretion to withhold requested government records.[52] Congress disagreed with the Court's broad construction of Exemption 3.[53] Legislators said the Supreme Court decision allowed an agency administrator "*carte blanche* to withhold any information he pleases."[54] Consequently, Congress revised Exemption 3 to create guidelines that strictly limit an agency executive's discretion to withhold information from the public.[55] This change is significant because, by expressly limiting agency discretion for withholding, the amendment reflected a congressional FOIA policy that favors disclosure.[56]

Congress revised the FOIA for the third time in 1986 when legislators amended the Act by passing the Freedom of Information Reform Act of 1986.[57] The amendment provided broader exemption protection for law enforcement information and added new exclusions for law enforcement records under Exemption 7,

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[51] *See Id.*

[52] *See Id.* at 266-67.

[53] In a House subcommittee report accompanying the proposed amendment, Congress specifically stated that the Supreme Court "misconceived the intent of Exemption 3." H.R. REP. No. 880, 94th Cong., 2nd Sess. pt. 1, 23 (1976), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 2204-05. *See* Sims v. CIA (Sims I), 642 F.2d 562, 567 (1980).

[54] H.R. REP. No. 880, 94th Cong., 2nd Sess. pt. 1, 23 (1976), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 2204-05.

[55] *See Id.*

[56] *See Id.*

[57] *See* 5 U.S.C. § 552(b)(7)(1986).

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FOIA's law enforcement exception.[58] More pertinent to this analysis, the 1986 amendment also created new provisions concerning fees and fee waivers.[59] Under these guidelines, fees recover only a small portion of the costs of responding to requests, thus making information economically accessible.[60]

The FOIA's amendments are in keeping with Congress' intent that the Act represents a broad policy of full disclosure, limited only by the nine exemptions,[61] which must be narrowly construed.[62] The public policy behind the FOIA was echoed by President Johnson when he signed the FOIA into law on July 4, 1966:

> This legislation springs from one of our most essential principles: A democracy works best when the people have all the information that the security of the nation permits. No one should be able to pull the curtain of secrecy around decisions which can be revealed without injury to the public interest.[63]

The Supreme Court has also articulated Congress' intent for the FOIA to represent a broad policy favoring disclosure. In a 1976 opinion written by Justice William J. Brennan in *U.S. Dept. of the Air Force v. Rose,*[64] the Court said the FOIA's legislative history makes it "crystal clear" that the congressional objective for the Act was to "pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny."[65] The Court further declared that the FOIA's statutory language and legislative history indicate that the statute was "broadly conceived"[66] and its nine exemptions must be narrowly construed.[67] Justice Brennan wrote that these "limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the act."[68]

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[58] *See Id.*

[59] *See Id.* §§ 552(a)(4)(A)(i-vii). The FOIA fee structure will be discussed in Part IV of this analysis.

[60] *See Id.*

[61] *See Id.* §§ 552(b)(1-9). *See supra* note 36.

[62] *See* U.S. Dept. of the Air Force v. Rose, 425 U.S. at 361.

[63] *See Statement by the President Upon Signing Bill Revising Public Information Provisions of the Administrative Procedure Act*, WEEKLY COMP. PRES. DOC. 895 (July 4, 1966).

The legislative history of the FOIA, the 1974 and 1976 amendments, and case law clearly evince a Congressional intent favoring disclosure and construing the statute's exemptions narrowly. Passage of the EFOIA amendments of 1996 clearly showed that Congress wanted to maintain the broad policy of full disclosure, by clarifying that the statute applies to electronic records -- a requirement that Congress had not before explicitly stated.[69]

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[64] 425 U.S. 352.

[65] *Id.* at 361 (quoting Rose v. U.S. Dept. of the Air Force, 495 F.2d. 261, 263 (1974)).

[66] *Id.* (quoting EPA v. Mink, 410 U.S. 73, 80 (1973)).

[67] *See* 495 F.2d. at 263.

[68] *Id.*

[69] *See* H.R. REP. No. 795, 104th Cong. 2nd Sess. 11 (1996).

Part II: The Electronic Freedom of Information Act

When President Johnson signed the FOIA into law, the statute made no mention of electronically recorded or stored information because government records were primarily produced on paper.[70] In 1955, when congressional hearings began laying the foundation for the FOIA, the federal government had 45 computers.[71] Ten years later, when the Senate passed its version of the FOIA, the computer inventory for the federal government was 1,826.[72] The number jumped to 5,277 by 1970.[73] By 1994, the federal government used 25,250 small computers (costing $10,000 to $100,000 each); 8,500 medium computers (costing $100,000 to $1 million each); and 890 large computers (more than $1 million each).[74] Other estimates for the number of computers used by the federal government run even higher.[75]

Against this backdrop of rapid computerization combined with the reluctance of agencies to apply the FOIA to electronic information,[76] as in the case of *SDC Development Corp. v.*

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[70] *See* INFORMING THE NATION: FEDERAL INFORMATION DISSEMINATION IN AN ELECTRONIC AGE 207, Office of Technology Assessment, OTA-CIT-396, U.S. Government Printing Office, October 1988.

[71] S. REP. 272, 104th Cong., 2d Sess. 8 (1996).

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *See* Bunker & Splichal, *supra* note 12, at 559-60, *citing* GENERAL SERVS. ADMIN., FEDERAL EQUIPMENT DATA CENTER, AUTOMATIC DATA PROCESSING EQUIPMENT IN THE U.S. GOVERNMENT (Apr. 1990).

[76] Attorney and FOIA authority Allan Robert Adler testified that "conflict, uncertainty and reluctance on the part of many

Mathews,[77] Congress enacted The Electronic Freedom of Information Act Amendments of 1996.[78] The amendments were the culmination of years of efforts by Senator Patrick Leahy and his supporters[79] to update the FOIA because public access to electronic information had become a problem.[80] Beginning in the mid-1970s, some agencies

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federal agencies in applying the FOIA to electronic records warranted the development and application of uniform administrative policies and practices." *Federal Information Policy: Hearings Before the Subcomm. On Government Reform and Oversight on Government Management, Information and Technology, 1996* WL 10828665 (statement of Allan Robert Adler). *See* H.R. REP. No. 795, 104th Cong. 2nd Sess. 12, 20-21 (1996). *See also, e.g.,* Dismukes v. Dept. of the Interior, 603 F.Supp. 760 (D.D.C. 1984)(holding that an agency has no obligation to comply with a FOIA requester's electronic-format preference); SDC Development Corp. v. Mathews, 542 F.2d 1116 (9th Cir. 1976)(holding that a requested biomedical and research database did not qualify as an "agency record" under the FOIA.)

[77] *See* 542 F.2d 1116.

[78] *See* Pub. L. No. 104-231, 110 Stat. 3048, §§ 1-12 (1996)(codified as amended in various sections of 5 U.S.C. § 552).

[79] Support for passage of the EFOIA came from a variety of library, press, civil liberties, consumer and research groups. 142 CONG. REC. S10715 (daily ed. Sept. 17, 1996)(statement of Sen. Leahy).

[80] *See supra* note 1. Congress acknowledged as early as 1974 that maintenance of federal agency records in computerized formats could potentially alter the calculus of information disclosure requirements under the FOIA. *See* S. REP. No. 854, 93rd Cong., 2d Sess. 12 (1974). The report said that "[w]ith respect to agency records maintained in computerized form, the term 'search' would include services functionally analogous to searches for records that are maintained in conventional form. Difficulties may sometimes be encountered in drawing clear distinctions between searches and other services involved in extracting requested information from computerized record systems. Nonetheless, the [Senate Committee on the Judiciary] believes it desirable to encourage agencies to process requests for computerized information even if doing so involves performing services which the agencies are not required to provide--for example, using its computer to identify records." *Id.* Congress also recognized the problems of access to electronically recorded government-held information in 1985 hearings before a subcommittee of the House

rejected FOIA requests for records in electronic form, arguing that the information did not qualify for disclosure under the Act.[81] The problem was underscored in some instances when federal courts ruled against FOIA requesters in disputes with agencies that withheld information that was recorded or stored electronically.[82]

The 1996 amendments establish that the rules for public access under the FOIA apply equally to electronic records and paper records,[83] and a search request for electronic records using software is to be treated the same as a paper search.[84] The law states that a "record" which is subject to the FOIA comprises information maintained by an agency in any format, including an electronic format.[85] Under the EFOIA, agencies must make reasonable efforts (1) to provide a record "in any form or format requested by the person if the record is readily reproducible by the agency in that form or format,"[86] and (2) to maintain records "in forms or formats that are reproducible" so

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Committee on Government Operations. The hearings were reported under the title *Electronic Collection and Dissemination of Information by Federal Agencies*, 99th Cong., 1st Sess. (1985).

[81] *See* Dismukes v. Dept. of the Interior, 603 F.Supp. 760 (D.D.C. 1984); SDC Development Corp. v. Mathews, 542 F.2d 1116 (9th Cir. 1976).

[82] *See Id.*

[83] *See* Pub. L. 104-231, 110 Stat. 3048, 3049, § 3 (1996)(codified as amended in subsection (f) of 5 U.S.C. § 552).

[84] *See Id.* § 4, amending § 552(a)(2).

[85] *See Id.* § 3(2), amending § 552(f).

[86] *Id.* § 5(B), amending § 552(a)(3).

that requests for the information can be honored.[87] The law also mandates that when agency officials redact parts of an electronic record because the information is determined to fall within one of the nine exemptions, they must note the location and the extent of any deletions made on the electronic record.[88]

Part III: EFOIA Section 3 and *SDC v. Mathews*

In all, the Electronic Freedom of Information Act comprises 12 sections,[89] 10 of which pertain directly or indirectly to electronic access or dissemination issues.[90] EFOIA Sections 7 and 8 concern administrative and procedural changes that deal with delays in processing FOIA requests and backlogs, and are beyond the scope of this analysis.[91] Section 3,[92] the

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[87] *Id.*

[88] *See Id.* § 9, amending § 552(a).

[89] *See* Pub. L. 104-231, 110 Stat. 3048, §§ 1-12(1996)(codified as amended in various sections of 5 U.S.C. § 552).

[90] *See Id.* §§ 1-6 and §§ 9-12.

[91] The EFOIA's administrative and procedural provisions are beyond the scope of this analysis. Briefly stated, the key provisions pertain to:

Multitrack processing: The EFOIA authorizes agencies to establish multi-track processing systems for requests, based on the amount of time the agency requires to provide the information and the timeliness needs of the requester. *See* Pub. L. 104-231, § 7, amending § 552(a)(6)(D) of 5 U.S.C.

Expedited Processing: The expedited-processing provision gives priority to two categories of requesters. The first category comprises those who would face significant harm if they fail to obtain information in a timely manner, including an imminent threat to life or physical safety. The second category applies to requesters "primarily engaged in the dissemination of information to the public, and involving compelling urgency to inform the public." *See Id.* § 8, amending § 552(a)(6)(E) of 5 U.S.C. Although this category does not specifically mention the terms "press" or "news media," it was created in response to requests from news media representatives and their supporters focus of this research project, clarifies the terms "agency" and "record," and expressly states that agency records maintained in electronic format are controlled by the requirements of the FOIA in the same way as paper records.[93] The section states that the FOIA is amended as follows:

> (f) For purposes of this section, the term --
> (1) "agency" as defined in § 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or an independent regulatory agency; and
> (2) "record" and any other term used in this section in reference to information includes any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format.[94]

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during EFOIA hearings. The requests came from hearings witnesses such as Byron York, reporter for *The American Spectator*, and Eileen Welsom, on behalf of the Society of Professional Journalists, the American Society of Newspaper Editors, and the Newspaper Association of America. *See* H.R. REP. No. 795, 104th Cong. 2nd Sess. 17 (1996). For example, Jane E. Kirtley, Executive Director of The Reporters Committee for Freedom of the Press, suggested in testimony that agencies should speed access requests from the media "whenever records are requested that would enlighten the public on matters where public concern is strong." *Id.*

Deadlines: The EFOIA extends the deadline to 20 work days for an agency to determine whether it will comply with an information request. Previously, agencies needed to respond within 10 work days. *See* Pub. L. 104-231, § 8, amending § 552 (a)(6)(A)(I) of 5 U.S.C.

Agency Backlogs: The 1996 amendment reinforces the requirement that agencies must respond to requests on time. Under the EFOIA, agencies can no longer delay responses to FOIA requests by citing "exceptional circumstances" simply because the delay results from a predictable agency workload. *Id.* § 7, amending § 552 (a)(6)(C) of 5 U.S.C.

[92] *See* Pub. L. 104-231, 110 Stat. 3048, 3049, § 3 (1996)(codified as amended in subsection (f) of 5 U.S.C. § 552).

[93] *See* H.R. REP. No. 795, 104th Cong. 2nd Sess. 19.

[94] Pub. L. 104-231, 110 Stat. 3048, 3049, § 3.

There are several reasons why Section 3 is significant: First, it provides for the first time a FOIA definition for the term "record," which the statute had never explained before.[95] The Freedom of Information Act defined the term "agency," but it did not define either "record" or "agency record." And still, the term "agency record" is not defined in the FOIA or any of its amendments.[96] Second, the section makes clear that the term "record" applies to information in any format, including electronic formats.[97] A 1996 House report that accompanied the EFOIA[98] illuminates the congressional intent behind another of Section 3's purposes -- to explicitly reject a 1976 definition of "agency records" used by the U.S. Court of Appeals for the Ninth Circuit in *SDC Development Corp. v. Mathews.*[99]

In *SDC v. Mathews*, the Ninth Circuit held that a widely used medical database, compiled and stored in a computer data bank by the National Library of Medicine, did not qualify as an

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[95] *See Id.*

[96] In 1989, 10 years after the Ninth Circuit decided SDC Development Corp. v. Mathews, a Supreme Court case clarified the meaning of the term "agency record" under the FOIA. In Department of Justice v. Tax Analysts, 492 U.S. 136 (1989), the Court noted that two requirements must be met for materials to qualify as "agency records." First, an agency must "either create or obtain" the material. *Id.* at 144 (quoting Forsham v. Harris, 445 U.S. 169, 182 (1980)). Second, the agency must be in control of the materials at the time the FOIA request is made. *Id.* at 145 (citing Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136, 157 (1980)).

[97] *See* Pub. L. 104-231, 110 Stat. 3048, 3049, § 3.

[98] *See* H.R. REP. No. 795, 104th Cong. 2nd Sess. 20.

[99] 542 F.2d 1116 (1976).

"agency record" for the purposes of the FOIA.[100] Because the terms "record" and "agency record" were not defined in the FOIA, the Ninth Circuit decided to draw its definition of "agency records" from a portion of the Records Disposal Act that deals with library materials.[101] The Ninth Circuit reasoned that a definition keyed to library materials was appropriate because the requested information was compiled by the National Library of Medicine.[102]

But according to the EFOIA House report, the Ninth Circuit's holding was inconsistent with the general policy of full disclosure expressed in the FOIA.[103] The House report said the Ninth Circuit used the library material exclusion in the Records Disposal Act "as an excuse to place these records beyond the reach" of the FOIA.[104] The EFOIA, the House report said, now "makes clear, contrary to *SDC v. Mathews,* that information an agency has created and is directly or indirectly disseminating remains subject to the FOIA in any of its forms or formats."[105]

SDC v. Mathews, a complex case and one of the earliest cases in computer access litigation under the FOIA,[106] serves as an illustration of how the ability to control and manipulate information in electronic formats makes electronically stored information more desirable and potentially far more valuable than equivalent data on paper.[107] But compiling data, incorporating it into a software delivery system and maintaining it can be costly, which is the issue that prompted the FOIA access request in *SDC v Mathews*.[108]

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[100] *Id.* at 1120-21.

[101] *Id.* at 1120, n. 8, *citing* 44 U.S.C. §§ 2901, 3301.

[102] *See Id.*

[103] *See* H.R. REP. No. 795, 104th Cong. 2nd Sess. 20.

[104] *Id.*

[105] *Id.*

[106] *See, e.g.,* Dismukes v. Dept. of the Interior, 603 F.Supp. 760 (D.D.C. 1984); Yeager v. Drug Enforcement Administration, 678

In this case, SDC Development Corp., a private, commercial user of biomedical and research information, made a FOIA request to obtain a database of the Medical Literature Analysis and Retrieval System (MEDLARS) for $500 -- the nominal cost of reproduction.[109] The MEDLARS database was created by the National Library of Medicine (NLM), a federal agency[110] established by Congress in 1956 as a division of the U.S. Department of Health, Education and Welfare.[111] The MEDLARS family of databases -- a computerized system for storing, indexing and retrieving medical

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F.2d 315 (D.C. Cir. 1982); Forsham v. Harris, 445 U.S. 169 (1980); Long v. Internal Revenue Service, 596 F.2d 362 (9th Cir. 1979).

[107] *See* Perritt, *supra* note 14; *See also* Gellman, *supra* note 14.

[108] *See* 542 F.2d at 1118.

[109] *See Id.*

[110] *See* 42 U.S.C. § 286(a).

[111] *See Id.* § 275. The Department later became the Department of Health and Human Services.

bibliographical data -- is an important and basic resource that is widely used in the biomedical and research communities.[112]

At the time, public access to the MEDLARS tapes was available online through MEDLINE,[113] the National Library of Medicine's online database system. But MEDLINE users were required to pay an hourly rate of $8 to $15 per hour for access to the MEDLARS tapes, depending on time of day; the higher rate applies to prime use hours.[114] Additionally, the computer tapes were available on an annual subscription basis for $50,000 through the National Technical Information Service,[115] a clearinghouse for the collection of scientific, technical and engineering information for dissemination to industry, business, government and the general public.[116]

The public also could have access to a printed version of the requested database, called *Index Medicus*, for the nominal cost of reproduction.[117] However, a printed listing is not as useful to or convenient for users of the information as a database could be.[118] For example, the user would have to incur the expense of rekeying the text into a computer, building the indices and creating computerized search capability. Furthermore, a printed text is not updated as quickly or as easily as its computerized counterpart, which can be continually updated. In other words, information in electronic formats is more valuable than the same data on paper because information users can manipulate the electronic information more efficiently.[119]

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[112] The MEDLARS database contains citations and abstracts of 2 million biomedical research articles from about 3,000 medical and scientific journals. *See Id.* at 1117.

[113] *See* 542 F.2d at 1117, n. 1.

[114] *See Id.* In 1976, when the Ninth Circuit heard the case, about 350 institutions subscribed to the MEDLINE online service. *Id.*

[115] *See Id.* at 1117-18.

[116] *See* The Technical Information Act, 15 U.S.C. §§ 1151-57. The database is updated annually, which is why subscribers must renew each year at the full subscription fee of $50,000 if they want to stay current. At oral arguments before the Ninth Circuit, the government said that no individual or institution had as yet paid $50,000 for the tapes. Instead, the NLM had entered into agreements under which universities and foreign government can have the tapes in exchange for services such as cataloguing, indexing and abstracting of medical publications to update the database. *See* 542 F.2d at 1118.

SDC brought suit in the U.S. District Court for the Central District of California after the government refused to release the MEDLARS database for nominal reproduction costs. The district court entered a summary judgment in favor of the government.[120] On appeal, the Ninth Circuit affirmed the district court decision, holding that the requested database did not qualify as an "agency record" under the FOIA.[121]

SDC's argument for access consisted of what the Ninth Circuit described as a "simple syllogism":[122] The FOIA requires reproduction, at a nominal cost, for all agency records not falling within one of the listed exemptions. The MEDLARS tapes were agency records, not specifically exempted. Therefore, the tapes must be reproduced at nominal cost.[123] Under the FOIA's fee structure, access fees essentially cover only the cost of search and reproduction.[124]

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[117] *See Id.* at 1117.

[118] *See* Perritt, *supra* note 14; *See also* Gellman, *supra* note 14.

[119] *See* Bunker & Splichal, *supra* note 12, at 560-61.

[120] *See* 542 F.2d at 1118.

[121] *Id.* at 1120-21.

[122] *Id.* at 1118.

The Ninth Circuit, however, rejected SDC's premise that the MEDLARS tapes were agency records. The appellate court's analysis, written for the three-judge panel by then-Circuit Judge Anthony M. Kennedy, began by noting that the terms "record" and "agency records" are not specifically defined by the statute.[125] The Ninth Circuit turned to the FOIA's legislative history for guidance on how to clarify these terms, and concluded that Congress intended for the statute's disclosure provisions to apply primarily to information concerning the "structure, operation, and decision-making procedure" of federal agencies.[126]

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[123] *See Id.*

[124] *See* 5 U.S.C §§ 552(a)(4)(A)(i-vii).

[125] 542 F.2d at 1118. *See also supra* note 96.

[126] 542 F.2d at 1119. The Ninth Circuit cited H. REP. No. 1497, 89th Cong., 2d Sess. 5-6 (1966) as "particularly enlightening." *Id.* at n. 7. The sections in the House report cited in the SDC v. Mathews opinion outlined a history of disclosure abuses by federal agencies in the years before the FOIA was enacted. From 1946 until the FOIA was signed into law in 1966, federal disclosure policies were controlled by The Administrative Procedure Act. *See* 5 U.S.C. § 1002. However, the Ninth Circuit opinion does not specify exactly what language in the report the court relied on as "particularly enlightening." It is significant to note also that the Ninth Circuit's interpretation of Congressional intent for the FOIA's purpose is substantially similar to the U.S. Supreme Court's interpretation of the Act's

The Ninth Circuit then examined the MEDLARS tapes to determine if they fell within the aforementioned description of information that qualified for disclosure, and made three findings. First, the court said there was a difference between the information in the MEDLARS tapes and the software system that delivers the information.[127] The court said the agency was not trying to protect its information; the agency simply wanted to protect its software delivery system, which "constitutes a highly valuable commodity."[128] The appellate court concluded that the agency was not contravening the legislative intent of the FOIA because the agency did not seek to "mask its processes or functions from public scrutiny. . . . [I]ts principal mission is the orderly dissemination of material it has collected. The agency is seeking to protect not its information, but rather its system for delivering that information."[129]

The software system's value led to the court's second finding: There was an economic issue behind disclosure.[130] The court said that by allowing any requester to gain access to the system at a nominal charge, the information gathering and dissemination function of the agency would be substantially

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"core purpose" as articulated in a case decided 13 years later: U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 774-75 (1989). The *Reporters Committee* decision will be discussed in detail later in this analysis.

[127] *See* 542 F.2d at 1120.

[128] *Id.*

[129] *Id.*

[130] *See Id.*

impaired.[131] The impairment would result because the National Library of Medicine had entered into agreements under which universities and foreign governments can have the tapes at no cost in exchange for services such as cataloguing, indexing and abstracting of medical publications to update the database.[132] Thus, the Ninth Circuit held, contractual relations with these organizations, designed to increase the agency's ability to acquire and catalog medical information, "would be destroyed if the tapes could be obtained essentially for free."[133] The court found that releasing the database at a nominal fee to the general public and private sector would undermine the system's commercial value, depriving the agency of income to defray the $10 million cost of developing and continually updating the system.[134] In other words, users would not pay the market rate for commercial access to the MEDLARS tapes if they could obtain the tapes for a nominal FOIA fee.

Third, the court made a distinction between the types of records that Congress intended to make available through the FOIA and the MEDLARS tapes. The court held that the MEDLARS tapes did not fall within any of the categories of information that Congress intended the FOIA to control, namely, information that that "directly reflect[ed] the structure, operation, or decision-making functions" of federal agencies.[135] Instead, the court reasoned that the MEDLARS tapes qualified as library reference materials because the tapes were compiled by the National Library of Medicine.[136] Furthermore, under the National Library of Medicine Act,[137] the Department of Health, Education and Welfare has wide discretion in setting charges for the use of library materials.[138] Therefore, the court of appeals concluded, the National Library of Medicine was not obligated to provide the MEDLARS database for the nominal cost of duplication.[139]

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[131] *See Id.*

[132] *See Id.* at 1118.

[133] *Id.* at 1120.

[134] *See Id.*

Congress, however, explicitly rejected the Ninth Circuit's rationale in EFOIA Section 3.[140] The House report accompanying the EFOIA said Section 3 nullifies *SDC v. Mathews* because the law clarifies that any information an agency has created and is

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[135] *Id.*

[136] *See Id.*

[137] *See* 42 U.S.C. § 275 (1976).

[138] *See Id.* § 276(c). "The Secretary is authorized, after obtaining the advice and recommendations of the Board [of Regents] . . . , to prescribe rules under which the Library will provide copies of its publications or materials, or will make available its facilities for research or its bibliographic, reference, or other services, to public and private agencies and organizations, institutions, and individuals. Such rules may provide for making available such publications, materials, facilities, or services (1) without charge as a public service, or (2) upon a loan, exchange, or charge basis, or (3) in appropriate circumstances, under contract arrangements made with a public or other nonprofit agency, organization, or institution." *Id.*

[139] *See* 542 F.2d at 1121.

[140] *See* H.R. REP. No. 795, 104th Cong. 2nd Sess. 20 (1996).

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directly or indirectly disseminating remains subject to the FOIA in any forms or formats.[141] Indeed, Section 3 may open the door for both commercial and non-profit FOIA users to gain access to a wide variety of useful electronically stored information, such as value-added computerized data, for nominal costs. But Section 3 also raises some important questions. For example, does EFOIA Section 3 prevent the government from selling -- or at least recovering reasonable costs of producing -- databases compiled by federal agencies at a substantial expense to the public?

Part IV: Economic Implications of EFOIA Section 3

Critics argue that congressional rejection of *SDC v. Mathews*, in particular, and efforts to widen the FOIA's applicability to computerized information, generally, may have far-reaching and undesirable implications for federal agencies because of the FOIA's liberal fee structure.[142] Under the FOIA fee guidelines established in the 1986 amendments, fees recover only a small portion of the costs of responding to requests.[143] In 1992, for example, government-wide costs for FOIA were reported at $108 million whereas fees amounted to $8 million.[144]

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[141] *See Id.*

[142] *See* David MacDonald, *The Electronic Freedom of Information Act Amendments: A Minor Upgrade to Public Access Law*, 23 RUTGERS COMPUTER & TECH. L.J. 357 (1997); Fred H. Cate, D. Annette Fields, James K. McBain, *The Right to Privacy and the Public's Right to Know: The "Central Purpose" of the Freedom of Information Act*, 46 ADMIN. L. REV. 41 (1994).

[143] *See* 5 U.S.C. §§ 552(a)(4)(A)(i-vii).

Fee schedules are established by each agency according to standards set by the Office of Management and Budget.[145] The statute provided that commercial requesters can be required to pay "reasonable standard charges" at most for only the direct costs of search, duplication or review.[146] Fees are limited to such charges for only document duplication if the records are not sought for commercial use, and the request is from an education or noncommercial scientific institution whose purpose is scholarly or scientific research, or a representative of the news media.[147] And when review costs are assessed, only the direct costs incurred during the initial examination of a document may be recovered.[148] Review costs may not include any expenses incurred in resolving issues of law or policy that may be raised in the course of processing a request.[149] Charges can be waived or reduced below the fees established for noncommercial users if disclosure would be in the public interest "because it is likely to contribute significantly to

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[144] *See* Michael Moss, *Public Eye: Federal Service Gets Wider Use by Sleuths, Snoops and Senators,* WALL STREET JOURNAL, Jan. 3, 1995, at A1.

[145] *See* 5 U.S.C. § 552(a)(4)(A)(i). *See also* Office of Management and Budget, Freedom of Information Act Fees, 52 Fed. Reg. 10012 (March 27, 1987).

[146] 5 U.S.C. § 552(a)(4)(A)(ii)(I).

[147] *See Id.* § 552(a)(4)(A)(ii)(II).

[148] *See Id.* § 552(a)(4)(A)(iv).

[149] *See Id.*

public understanding of the operations or activities" of the government.[150]

As a result of Congress' decision to override *SDC v Mathews*, agencies that compile value-added data can suffer adverse economic consequences, argued attorney David MacDonald.[151] By permitting "indiscriminate access" to value-added proprietary databases under the FOIA fee structure, he asserted, agencies are prevented from recovering reasonable costs from private parties who benefit commercially from access to the information.[152]

MacDonald contended that the Ninth Circuit decision in *SDC v. Mathews* was correct in making an important distinction between proprietary information systems and agency records reachable under the FOIA.[153] In his view, the distinction protected value-added information contained in the databases such as MEDLARS from access under the FOIA fee structure.[154] By overriding the Ninth Circuit decision, Congress established that all electronic records would be subject to disclosure, including information libraries and other value-added data.[155] Consequently, agencies that produce value-added information may find it difficult to protect their substantial investments, and this is a reasonable concern.[156]

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[150] *Id.* § 552(a)(4)(A)(iii).

[151] *See* MacDonald, *supra* note 142, at 379.

[152] *Id.* at 387.

[153] *See Id.* at 373.

[154] *See Id.*

[155] *See Id.*

The expense of building and maintaining some databases can run into the millions of dollars. It cost the National Library of Medicine $10 million to create the MEDLARS family of databases in 1976.[157] The technology of that time was rudimentary and relatively costly compared to the technology emerging today. To illustrate this point, compare the cost and capability of a personal computer today with a personal computer built 10 or even five years ago. Still, the new technology remains very expensive, as it enables government to embark on highly complex projects to produce value-added data that were not imagined by most people a quarter of a century ago. For example, a single municipal geographic information system (GIS) can cost $8 million to complete,[158] and this price tag is modest compared to what it can cost to create and maintain the kinds of databases used by federal agencies.

Extending FOIA access to the growing number of computerized records in general would increase agency costs exponentially,[159] according to Professor Fred H. Cate and his colleagues. Cate argued that the FOIA already has been extended "far beyond its original purpose" by requesters, agencies, litigants and courts.[160] The vast majority of FOIA requesters do not seek information about government activities, he said, but rather want information about business competitors, opposing parties in litigation and the activities of other non-governmental entities.[161]

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[156] *See Id.* at 380.

[157] *See* SDC Development Corp. v. Mathews, 542 F.2d at 1120.

[158] *See* Gary H. Anthes and Mindy Blodgett, *States Eye Online Revenues*, COMPUTERWORLD, August 19, 1996, at 26. The subject of this article was an $8 million geographic information system produced by the city of Phoenix.

Cate said that extending the applicability of the FOIA violates the purpose for which the Act was created and also costs taxpayers billions of dollars responding to requests "seeking no information 'about what the government is up to.'"[162] The costs associated with "this misuse of the FOIA increase as more requesters use the Act to discover information about non-governmental activities and as the volume of agency records subject to the FOIA expands," Cate and his colleagues said.[163] "Those costs threaten to increase exponentially, however, if the

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[159] *See* Cate, *supra* note 142, at 66.

[160] *Id.* at 65.

[161] *See Id.*

[162] *Id.* at 65 (quoting U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 772 (1989)). Cate quotes the often cited remark -- "what the government is up to" -- to allude to the *Reporters Committee* opinion, which supports Cate's point of view and which will be discussed in detail in Part V of this analysis. But actually, this remark derives from a passage in an article written by historian Henry Steele Commager for THE NEW YORK REVIEW OF BOOKS, Oct. 5, 1972, at 7. *See infra* note 209.

[163] *See* Cate, *supra* note 142, at 66. Cate and his co-authors cited a 1982 article by Antonin Scalia, in which Scalia described the FOIA as "the Taj Mahal of the Doctrine of Unanticipated Consequences, the Sistine Chapel of Cost-Benefit Analysis Ignored." *See* Scalia, *supra* note 40, at 15.

FOIA is applied to the increasing number of computerized agency records."[164]

The burgeoning use of the federal disclosure statute, which Professor Cate said prompted his concerns,[165] is well documented. The FOIA's expanded use since its enactment in 1966 is reflected in its costs of operation. FOIA operations cost $108 million in 1992,[166] representing an increase of about $17 million over the previous year.[167] By comparison, the FOIA's government-wide costs in 1966 were $50,000.[168] Even allowing for inflation during this 26-year-period, the increase in FOIA costs is substantial.

Patricia M. Wald, Circuit Judge for the U.S. Court of Appeals for the District of Columbia, observed in 1984 that "like all freedoms, the FOIA turned out to have its price, financially and otherwise, and some costs proved to be more unexpected than others."[169] Judge Wald explained that within a decade after the FOIA was enacted, businesses figured out they could use the FOIA to get information about competitors, and lawyers found they could often extract facts faster through FOIA requests than through civil discovery.[170] The FOIA became a "mini-industry," she wrote, providing information mainly to businesses or their lawyers.[171] She cited a General Accounting Office survey that showed only one out of every 20 FOIA requests was made by a journalist, a scholar or an author.[172]

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[164] *See* Cate, *supra* note 142, at 66.

[165] *See Id.* at 49-51.

[166] *See* Moss, *supra* note 144. *See also* Eric J. Sinrod, *Freedom of Information Act Response Deadlines: Bridging the Gap Between Legislative Intent and Economic Reality*, 43 AM. U. L. REV. 325, 334 (1994).

[167] *See* Sinrod, *supra* note 166.

[168] Edward C. Schmults, U.S. Deputy Attorney General, *FOI Act Classic Example of Law That Needs Improving, reprinted in Freedom of Information Act: Hearings on S. 587, S. 1235, S. 1247, S. 1730, and S. 1751. Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 880 (1981).

[169] Patricia M. Wald, *The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values*, 33 EMORY L.J. 649, 664-65 (1984).

But MacDonald, Cate and other critics[173] may be tolling warning bells prematurely. Under current law, the test for FOIA applicability arguably would already exclude many of the materials that critics fear would be subject to disclosure. This test was established in a seminal 1989 Supreme Court case, *U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press.*[174] *Reporters Committee* is a most important ruling because it stands for the Supreme Court's current interpretation of the FOIA's central purpose.[175]

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[170] *See Id.* at 665.

[171] *Id.*

[172] *Id., citing 1 1981 Senate Hearings* 159, 161 (testimony of Jonathan Rose, Executive Summary, Oversight of the Administration of the Federal Freedom of Information Act.)

[173] *See* George B. Turbow, *Protecting Informational Privacy in the Information Society*, 10 N. ILL. U. L. REV. 521 (1990)(supporting the Supreme Court decision in U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989)). In *Reporters Committee*, the Court presented the "core purpose" doctrine that limits disclosure of private information under the FOIA. *Id.* at 774-75.

[174] *See* 489 U.S. 749.

Part V: *U.S. Dept. of Justice v. Reporters Committee*

The Supreme Court held unanimously in *Reporters Committee* that federal agencies can withhold computerized FBI compilations of "rap sheets" on private citizens even though the information might be available in public records available in local or state offices.[176] In an opinion written by Justice John Paul Stevens, the Court ruled that the disclosure of compilations of an individual's criminal records is an unwarranted invasion of privacy under Exemption 7(C), the FOIA law enforcement exception, when the request does not seek official information that directly reveals government operations or activities.[177]

The decision ended an 11-year effort by CBS reporter Robert Schakne and the Reporters Committee for the Freedom of the Press to obtain the FBI's rap sheet -- a record of arrests, indictments, convictions or acquittals -- on reputed crime figure Charles Medico.[178] Schakne was investigating Medico because Medico's company allegedly received defense contracts in exchange for political contributions to a corrupt Pennsylvania Congressman, Daniel J. Flood.[179] The Pennsylvania Crime

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[175] *See Id.* at 774.

[176] *See Id.* at 763.

[177] *See Id.* at 773-75.

[178] *See Id.* at 757.

[179] *See Id.* Flood pleaded guilty on Feb. 26, 1980 to conspiracy to violate federal campaign laws and was placed on probation for a year. He was convicted of conspiracy to solicit campaign contributions from persons seeking federal government contracts. The 76-year-old Pennsylvania Democrat had resigned from the

Commission had identified Medico Industries as a legitimate business dominated by organized-crime figures.[180] The FBI provided Schakne with information on three of Charles Medico's brothers, who were deceased, but the agency refused to release the requested information on Charles Medico, who was still living.[181] Schakne brought suit in U.S. District Court for the District of Columbia, and the district court granted the FBI's motion for summary judgment, holding that the information was protected under FOIA Exemption 7(C)[182] and disclosure would be an unwarranted invasion of Charles Medico's privacy.[183] The D.C.

House Jan. 31, 1980. He was tried on charges of bribery, perjury and conspiracy in 1979. However, that trial, held in U.S. District Court in Washington, D.C., ended in a mistrial on Feb. 3, 1979, when jurors could not reach a decision after three days of deliberations. *See* Laura Kiernan, *Flood Is Placed on Year's Probation*, THE WASHINGTON POST A8, Feb. 27, 1980.

[180] *See* 489 U.S. at 757.

[181] *See Id.* at 757.

[182] 5 U.S.C. § 552 (b)7(C). The exemption states that the FOIA does not apply to matters that are "(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy. Exemption 7(C) is one of two privacy exceptions to the FOIA. The other exception, Exemption 6, pertains to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *Id.* § 552 (b)6.

Two key differences between the exemptions are evident in their statutory language. First, Exemption 6 calls for "a *clearly* unwarranted invasion" of privacy (italics added). *Id.* Exemption 7 requires a less strict standard, asking an agency to show only "an unwarranted invasion of privacy." *Id.* § 552 (b)7(C). Second, Exemption 6 applies to information that, if disclosed, "*would* constitute" an invasion of privacy (italics added). *Id.* § 552 (b)6. Exemption 7, on the other hand, applies to information the disclosure of which "*could reasonably be expected* to constitute" an invasion of privacy (italics added). *Id.* § 552 (b)7(C).

Circuit reversed, concluding that the government cannot claim a privacy interest in FBI-compiled records that would be available to the public if sought from the individual law enforcement agencies.[184]

The difference in language was intentional. The legislative history shows that Exemption 7(C), as originally proposed by Sen. Gary Hart, also required a "*clearly*" unwarranted invasion of personal privacy. *See* 120 CONG. REC. 17033 (1974). However, the word "clearly" was dropped by the Conference Committee as a concession in negotiations with President Ford to get the Act approved. *See* CONF. REP. No. 93-1380, 93d Cong. 2d. 11 (1974). By dropping "clearly," the Exemption lessened the agency's burden to meet the test. *See* O'REILLY, *supra* note 42, at 17-44. Legislators also agreed to the difference in language between "would" in Exemption 6, and "could reasonably be expected" in Exemption 7(C) in order enact the legislation.

As a result, courts have concluded that Exemption 7(C) allows law enforcement officers more latitude to withhold records to protect privacy than is permitted under the stricter standard of Exemption 6. *See* U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749, 755-756 (1989). In addition, Exemption 7(C) means the public interest in disclosure carries less weight. *Id.*

In making a determination in a privacy-interests case under Exemption 7(C), the courts uses a two-step test. *See* 5 U.S.C. § 552(b)7(C) (1994). First, the documents must have been compiled for law enforcement reasons because this Exemption pertains only to investigative records. Second, the government must prove that the disclosure could "reasonably be expected to constitute an unwarranted invasion of privacy." *Id.*

Likewise, the courts use a similar test in deciding an Exemption 6 privacy-interests case. The courts first must determine if the records falls within the definition of "personnel," "medical" or "similar" files. *Id.* § 552(b)6 (1994). Second, the courts must balance the invasion of the individual's personal privacy against the public benefit that would result from disclosure. To withhold information, the government must show that the disclosure "would constitute a clearly unwarranted invasion of privacy." *Id. See* U.S. Dept. of the Air Force v. Rose, 425 U.S. 352 (1972).

[183] *See* U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. at 757-59.

[184] *See* Reporters Committee for Freedom of the Press v. U.S. Dept. of Justice, 816 F.2d 730, 740 (1987).

But the Supreme Court reversed the D.C. Circuit and permitted the FBI to withhold the information. The Court said it reached its outcome by balancing the individual's right of privacy against the public interest in disclosure.[185] The Court held that the public interest to be balanced against the privacy interest is that of disclosing only information that directly reveals the operations or activities of the government.[186]

Justice Stevens wrote that FOIA's "central purpose is to ensure that the government's activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the government be so disclosed."[187] The Court concluded that disclosure of a computerized compilation of an individual's criminal records, which do not directly reveal governmental operations or performance, is an unwarranted invasion of privacy because the information falls "outside the ambit of the public interest that the FOIA was enacted to serve."[188] In the Court's view, in other words, the rap sheets did not directly reveal information about how government operates and, therefore, could be withheld.[189] The information would "tell us nothing directly about the character of the Congressman's behavior," Justice Stevens wrote.[190] "Nor would it tell us anything about the conduct of the Department of Defense in awarding one or more contracts to the Medico Company."[191]

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[185] *See* U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. at 772-73 (citing U.S. Dept. of the Air Force v. Rose, 425 U.S. 352, 372 (1976)).

[186] *See Id.*

[187] *Id.* at 774.

[188] *Id.* at 775.

[189] *See Id.* at 774-75.

Justice Stevens made a particular point to note that the request was for computerized information and that computerization of personal information poses a special potential threat to privacy.[192] The Court acknowledged that Medico's criminal history of arrests, indictments and convictions are public records, which might be acquired after a search of courthouse files and records of local law enforcement agencies that investigated and prosecuted him.[193] But Justice Stevens emphasized that Schakne sought a computerized compilation of all of this information, and the privacy interest in a rap sheet is substantial.[194] "The substantial character of that interest is affected by the fact that in today's society the computer can accumulate and store information that would have otherwise surely been forgotten long before a person attains the age of 80, when the FBI's rap sheets are discarded."[195] Justice Stevens said there is a "vast difference between the public records that might be found after a diligent search of courthouse files, county archives and local police stations throughout the country and a computerized summary located in a single clearinghouse of information."[196]

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[190] *Id.* at 774.

[191] *Id.*

[192] *See Id.* at 764, 770-71.

[193] *See Id.* at 764.

[194] *See Id.* at 771.

[195] *Id.*

The *Reporters Committee* majority position was criticized, however, in a concurring opinion by Justice Harry A. Blackmun, joined by Justice Brennan. Justice Blackmun argued that the Court opinion exempting *all* rap-sheet information from the FOIA's disclosure requirements was overbroad in light of Exemption 7(C)'s plain language, legislative history and case law.[197] He characterized the Court majority's "bright-line rule" as not basically sound.[198] To illustrate his point, Justice Blackmun presented a hypothetical situation in which a rap sheet disclosed a congressional candidate's conviction of tax fraud before he ran for office.[199] The FBI's disclosure of that information could not reasonably be expected to constitute an invasion of personal privacy, much less an unwarranted invasion, because the candidate gave up any interest in preventing disclosure of this information when he chose to run for office, Justice Blackmun said.[200] "I would not adopt the Court's bright-line approach but would leave the door open for the disclosure of rap-sheet information in some circumstances," he concluded.[201]

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[196] *Id.* at 764.

[197] *See Id.* at 780-81 (Blackmun, J., concurring).

[198] *Id.*

[199] *See Id.*

[200] *See Id.*

The *Reporters Committee* ruling has major significance because its holding stands for the Supreme Court's current interpretation of the FOIA's purpose -- to provide public access only to official information that directly reveals governmental operations or activities.[202] This ruling represents a much narrower interpretation of the FOIA's scope than the Court found in *U.S. Dept. of the Air Force v. Rose*[203] in 1976. The *Rose* Court said the FOIA's legislative history clearly shows that Congress intended for the "broadly conceived" Act to permit access to official information and open agency action to public scrutiny.[204] Justice Brennan emphasized in *Rose* that the exemptions are limited, must be narrowly construed,[205] and do not obscure the fact that disclosure is the FOIA's dominant objective.[206]

The *Reporters Committee* opinion set forth the principle that the "statutory purpose" of the FOIA is to disclose only official information that "sheds light on an agency's performance."[207] By so holding, the Court established a "conduct test" as a threshold question that lower courts must answer even before determining whether requested information might fall within one of the nine exemptions.[208]

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[201] *Id.*

[202] *See Id.* at 773-75.

[203] *See* 425 U.S. 352 (1976).

[204] *Id.* at 361 (citing EPA v. Mink, 410 U.S. 73, 80 (1973)).

[205] *See Id.*

[206] *See Id.*

An analysis of the Court's reasoning in *Reporters Committee* shows that its conduct test derives from a two-step process. First, the Court established that the FOIA's basic policy of disclosure "focuses on the citizens' right to be informed about 'what their government is up to.'"[209] Second, the Court equated the public's need to know "what their government is up to" with a need to evaluate government performance:

> Official information that sheds light on an agency's *performance* of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various government files but that reveals little or nothing about an agency's own *conduct*. In this case -- and presumably in the typical case in which one private citizen is seeking information about another -- the requester does not intend to discover anything about the *conduct* of the agency that has possession of the requested records. Indeed, response to this request would not shed light on the *conduct* of any Governmental agency or official."[210] (Italics added.)

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[207] U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. at 773.

[208] *See Id.*

[209] *Id.* at 773. The reference to citizens having a right to know "what their government is up to," comes from an Oct. 5, 1972, article written by historian Henry Steele Commager in THE NEW YORK REVIEW OF BOOKS. A passage from Commager's article was quoted by Justice William O. Douglas in his dissent to EPA v. Mink, 410 U.S. 73, 80 (1973). The entire passage bears repeating because the *Reporters Committee* opinion quotes the phrase several times. Commager wrote: "The generation that made the nation thought secrecy in government one of the instruments of Old World tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know what their government is up to."

[210] 489 U.S. at 773.

In other words, although federal agencies collect vast amounts of information on virtually every facet of society, compiled at a tremendous expense to the public, the public is entitled to gain access to only a limited class of information as prescribed by the Court's narrowly drawn "core purpose" of the Freedom of Information Act.[211] The Court's narrow interpretation of the FOIA's purpose seemingly ignores the public interest value of a wealth of government-held information that does not reveal government operations or conduct. Such information includes census data, economic data and public health and safety information, ranging from commercial aircraft maintenance records from the FAA to the results of clinical trials on over-the-counter drugs from the FDA.

As a result of the Court's narrow interpretation of the FOIA's central purpose, dire warnings about EFOIA Section 3's implications are largely overstated. Under the *Reporters Committee* conduct test, it seems unlikely that types of information like the data in the MEDLARS tapes would qualify for disclosure. As the Supreme Court plainly said in a 1997 ruling that relied on *Reporters Committee* as precedent: "[T]he *only* relevant public interest in the FOIA balancing analysis" is "the extent to which disclosure of the information 'sheds light on an agency's performance of its statutory duties' or otherwise lets citizens know 'what their government is up to.'"[212]

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[211] *See Id.* at 774-75.

[212] Bibles v. Oregon Natural Desert Assn., 117 S.Ct. 795, 795 (1997)(quoting U.S. Dept. of Defense v. FLRA, 114 S.Ct. 1006,

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Discussion

Congress intended for EFOIA Section 3[213] to provide access to federal agency databases containing the kinds of public interest information found in the MEDLARS tapes.[214] Meanwhile, however, the decision in *U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press*[215] still stands for the proposition that the scope of the FOIA is limited[216] and would exclude precisely the kind of information contained in the MEDLARS tapes. Under the Court's central purpose doctrine,[217] the

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1013 (1994), and U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. at 773). In *Oregon Natural Desert Assn.*, the Supreme Court held that the Bureau of Land Management could reject a FOIA request from an Oregon environmental group that sought a list of names of persons who receive mailings from the BLM on the government's plans for the future of the Oregon high desert. The Supreme Court also relied on *Reporters Committee* as precedent in two earlier FOIA Exemption 6 privacy cases, U.S. Dept. of Defense v. Federal Labor Relations Authority (FLRA), 114 S. Ct. 1006 (1994)(holding that the release of home addresses of government employees to union organizers would be a "clearly unwarranted" invasion of privacy); and U.S. Dept. of State v. Ray, 502 U.S. 164 (1991)(holding that the release of identifying information about Haitian refugees, who fled to the United States and were sent back involuntarily to Haiti, could be withheld because disclosure would constitute a "clearly unwarranted" invasion of privacy).

[213] *See* Pub. L. 104-231, 110 Stat. 3048, 3049, § 3 (1996)(codified as amended in subsection (f) of 5 U.S.C. § 552)(1996).

[214] *See* H.R. REP. No. 795, 104th Cong. 2nd Sess. 20 (1996).

[215] *See* 489 U.S. 749 (1989).

[216] *See Id.* at 773-75.

[217] *See Id.* at 774.

tapes would not directly reveal government operations or activities and thus flunk the conduct test.[218]

Consequently, the future implications of Section 3 remain elusive even though the MEDLINE/MEDLARS question has been settled. The National Library of Medicine made both services available to the public free of charge on the Internet as of June 26, 1997.[219] MEDLINE users now can gain access to the online terminal service on the World Wide Web.[220] In addition to MEDLINE, the National Library of Medicine is also making the MEDLARS databases available online.[221]

Although the MEDLINE/MEDLARS question is resolved, the much larger issue it represented from the outset remains unsettled: Does *SDC Development Corp. v. Mathews*[222] conflict with *Reporters Committee*,[223] and if so, to what effect? Congress made it clear that Section 3 overrode *SDC v. Mathews*, but did

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[218] *See Id.* at 773.

[219] *See* <http://www.nlm.nih.gov>. *See also* Peter Gorner, *Health Consumers Get Web Break: U.S. Allows Free, Open Internet Access to Medical Library*, CHICAGO TRIBUNE, June 29, 1997; Sheryl Gay Stolberg, *Now, Prescribing Just What the Patient Ordered*, NEW YORK TIMES, Aug. 10, 1997.

[220] *See Id.*

[221] In an interview with this author, Sheldon Kotzin, chief of the bibliographic services division of the National Library of Medicine, said the process of making the MEDLARS family of databases available for free through MEDLINE began in August of 1997. The process was still under way at the time of the interview, April 23, 1998, and was several months from completion, he said.

[222] *See* 542 F.2d 1116 (9th Cir. 1976).

[223] *See* 489 U.S. 749 (1989).

Congress realize that in overcoming that case, EFOIA Section 3 collided with *Reporters Committee*? Perhaps some in Congress intended Section 3 to be an attack on *Reporters Committee*, but the evidence is inclusive.

Some members of the Senate, at least, were fully cognizant of the *Reporters Committee* ruling's profound consequences on the scope of the FOIA.[224] The record shows that the Senate Committee on the Judiciary reached a consensus in 1995 that the *Reporters Committee* decision conflicted with the FOIA's general philosophy of full disclosure.[225] This view was articulated in a Senate report that accompanied a 1995 precursor to the House-sponsored EFOIA of 1996 -- The Electronic Freedom of Information Improvement Act of 1995, which was a Senate bill introduced by Senator Leahy.[226] The Senate report directly addressed the Supreme Court's central purpose doctrine, and concluded in strongly worded terms that the Court construed the purpose of the FOIA too narrowly in *Reporters Committee*.[227]

> The purpose of the FOIA is not limited to making agency records and information available to the public only in cases where such material would shed light on the activities and operations of Government. Effort by the courts to articulate a 'core purpose' for which information should be released imposes a limitation on the FOIA which Congress did not intend and which cannot be found in its language, and distorts the broader import of the Act in effectuating Government openness.[228]

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[224] *See* S. Rep. 272, 104th Cong., 2d Sess. 6 (1996).

[225] *See Id.*

[226] *See* S. 1090, 104th Cong., 2d Sess. (1996).

[227] *See* S. Rep. 272, 104th Cong., 2d Sess. 26-27.

[228] *Id.*

Leahy's bill was unanimously approved by the Committee on the Judiciary on April 25, 1996,[229] but congressional action on the Senate proposal ended there. After negotiations with the House, Leahy's Senate bill was revised and reintroduced as House bill H.R. 3802 on July 12, 1996.[230] Three months later, that bill was signed into law as the Electronic Freedom of Information Act Amendments of 1996 (EFOIA).[231] However, the House report accompanying the legislation failed to contain any language criticizing the *Reporters Committee* decision.

This omission of such clarifying language allows *Reporters Committee* to trump EFOIA Section 3 because there is nothing in the statutory language of Section 3 to override *Reporters Committee*. The new FOIA language contained in Section 3 offers a definition of "record": The term "record" and "any other term used in this section in reference to information includes any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format."[232] The attack on *SDC v. Mathews* is not in the statute's language. Rather, it is stated in the EFOIA House report that discussed the congressional intent behind Section 3 and makes no mention of *Reporters Committee*.[233]

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[229] *See Id.* at 6.

[230] *See* H.R. REP. No. 795, 104th Cong. 2nd Sess. 14 (1996).

[231] *See* Pub. L. No. 104-231, 110 Stat. 3048, §§ 1-12 (1996)(codified as amended in various sections of 5 U.S.C. § 552).

[232] *See Id.* § 3 (1996)(codified as amended in subsection (f) of 5 U.S.C. § 552).

As a result, the *Reporters Committee* ruling represents a serious threat to the future of public access to information held by federal agencies. There already is a long line of lower court FOIA cases that have relied on the *Reporters Committee* central purpose test.[234] Until recently, the lower courts have used the central purpose analysis only in FOIA cases involving privacy Exemptions 6 or 7 (C).[235] But Christopher P. Beall, writing in the *Duke Law Journal*, has pointed out that several courts recently have broadened the central purpose doctrine's scope by incorporating it in the analyses of FOIA cases "that had little to do with these traditional privacy exemptions."[236]

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[233] *See* H.R. REP. No. 795, 104th Cong. 2nd Sess. 20.

[234] *See* 489 U.S. at 774-75. *See, e.g., Sheet* Metal Workers International Assn., Local 9 v. U.S. Air Force, 63 F.3d 994 (10th Cir, 1995); Sheet Metal Workers International Assn., Local 19 v. Dept. of Veteran Affairs, No. CIV.A.95-0935, 1995 WL 552876 (E.D. Pa. Sept. 14, 1995); Manna v. U.S. Dept. of Justice, 51 F.3d 1158 (3d Cir.), *cert. denied,* 116 S. Ct. 477 (1995); Exner v. U.S. Dept. of Justice F. Supp. 240 (D.D.C. 1995); Jones v. FBI, 41 F.3d 238 (6th Cir. 1994); U.S. Dept. of the Navy v. Federal Labor Relations Authority, 975 F.2d 348 (7th Cir. 1992); Hunt v. FBI, 972 F.2d 286 (9th Cir. 1992); Hale v. U.S. Dept. of Justice v, 973 F.2d 894 (10th Cir. 1992); Hopkins v. U.S. Dept. of Housing and Urban Development, 929 F.2d 81 (2nd Cir. 1991); and Schwaner v. U.S. Dept. of the Air Force, 898 F.2d 793 (D.C. Cir. 1990).

[235] *See* 5 U.S.C. §§ 552(b)6 & (b)7(C).

[236] Christopher P. Beall, *The Exaltation of Privacy Doctrines Over Public Information Law*, 45 DUKE L.J. 1249, 1273 (1996). Beall cites three cases in which courts have broadened the applicability of the central purpose holding: *See* Sweetland v. Walters, 60 F.3d 852 (D.C. Cir. 1995)(per curiam)(holding that the Executive Residence staff of the White House is not an "agency" under the FOIA); Baizer v. U.S. Dept. of the Air Force, 887 F. Supp. 225 (N.D. Cal. 1995)(holding that an electronic

Such a trend might find support among FOIA critics such as MacDonald, Cate and other commentators mentioned in this analysis. Indeed, Cate and his colleagues wrote that in order to achieve the FOIA's intended purpose, the Court's central purpose test "should be the touchstone for disclosure."[237] They urged further that the central purpose test should be expanded "beyond Exemptions 7(C) and 6, and beyond FOIA exemptions altogether."[238]

For access advocates, however, a broad application of the central purpose test by the courts might be viewed as a disturbing trend that could further constrict the ambit of the FOIA's statutory purpose as evinced in its plain language and legislative history. This analysis strongly suggests that Section 3 does not solve the problem posed by *Reporters Committee* -- namely, that the Court's interpretation of the FOIA's purpose was narrowly drawn and contravened the statute's legislative intent.

Conclusion

It is poor public policy for Congress to allow the conflict between the FOIA and the 1989 *Reporters Committee*

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copy of the Air Forces' computerized database of Supreme Court opinions should not be considered an "agency record" under the FOIA); Vazquez-Gonzalez v. Shalala, No. CIV.94-2100 (SEC), 1995 WL 67659 (D.P.R. Feb. 13, 1995)(dismissing a suit brought by a physician who sought information about Medicare billing practices; the court held the suit did not advance the policy considerations of the FOIA because the requested information concerned the plaintiff's own commercial interests). *See Id.* at 1273-80.

[237] *See* Cate, *supra* note 142, at 45.

[238] *Id.*

ruling to remain unresolved for so many years -- nearly a decade has elapsed since the Court handed down its FOIA core purpose ruling. In Section 3, Congress seemed to advance public access rights by making "all information that an agency has created and is directly or indirectly disseminating subject to the FOIA in any of its forms or formats."[239] But the *Reporters Committee* ruling, on the other hand, established that the "statutory purpose" of the FOIA is to disclose only official information that "sheds light on an agency's performance."[240] This conflict, which can be likened to driving a car with one foot on the gas pedal and one foot on the brake, needs to be resolved.

There is ample precedent for Congress to override the Supreme Court's ruling in order to settle this conflict. As noted earlier in this analysis, Congress in 1974 revised Exemption 1, the national security exemption, in direct response to a 1973 Supreme Court decision in *EPA v. Mink*.[241] And in 1976, Congress amended the FOIA to clarify Exemption 3 in the aftermath of a 1975 Supreme Court decision, *Administrator, FAA v. Robertson*.[242]

An FOIA amendment aimed at overriding *Reporters Committee* would not only serve the nation's democratic interests in open government, but also would be in keeping with the spirit of the Freedom of Information Act as originally envisioned by Congress when it first crafted the Act in 1965. In introducing the legislation that would lead to the FOIA, Senator Edward V. Long quoted James Madison who declared:

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[239] *See* H.R. REP. No. 795, 104th Cong. 2nd Sess. 20 (1996).

[240] U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. at 773.

[241] *See* 410 U.S. 73 (1973). *See also* discussion of *Mink* in Part I of the accompanying text.

[242] *See* 422 U.S. 255 (1975). *See also* discussion of *Robertson* in Part I of the accompanying text.

> A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[243]

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[243] *See* S. REP. No. 813, 89th Cong., 1st Sess. 2-3 (1965). Actually, Sen. Long did not get Madison's quote quite right. The quotation in the accompanying text is correct. Letter from James Madison to William T. Berry (Aug. 4, 1822), *in* 9 THE WRITINGS OF JAMES MADISON, at 103 (Gaillard A. Hunt ed., 1910). Sen. Long juxtaposed the first and last sentences of the quotation, and that is how Madison's remarks are printed in the 1965 Senate report. FOIA legislators and commentaries on the Act often cite Madison's famous quotation to support the view that public access to government information has historic roots traced to the Framers. The philosophy Madison expressed in the quotation certainly can be interpreted in this regard, but it is important to note that the remark actually was made in the context of expanding public education. *See* Paul H. Gates, Jr. and Bill F. Chamberlin, *Madison Misinterpreted: Historical Presentism Skews Scholarship*, 12 AMERICAN JOURNALISM 38 (1996).

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Mirrored in Parody, Mired in Paradox:
Trademark Dilution and An Ancient Art

AEJMC 1998 Convention Paper

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Abstract:

The passage of the Federal Trademark Dilution Act (FTDA) in early 1996 opened up the latest battleground for litigation between those who practice the ancient art of parody and those who feel its sting. This paper explores recent legal frameworks along with historical factors, changing technologies, and aspects of politics and culture which make parody as a form of commentary more controversial, and arguably more vital, than ever.

The Controversy:

If imitation is the most sincere form of flattery, as the familiar adage claims, then perhaps the same logic would explain why criticism through imitation stings so deeply. The ancient craft of social commentary through parody is described with a mixture of fear and respect among the earliest written works in Western history, an attitude still held by many people today. Some pre-literate civilizations regarded the "magic" of humorous commentary to have the same kind of mystical power as faith medicine.[1] Poets, playwrights, novelists, journalists, cartoonists, filmmakers, and many others have endured substantial threat to their lives and livelihood so that they might contribute to this grand tradition, which some have characterized as noble, and others, as parasitic. The power to mock the mighty -- to steal the very words, symbols, style or mannerisms that distinguish a person or institution for the purpose of calling attention to its flaws – rightly strikes fear into the hearts of the ruling class, even as it inspires hope among the oppressed. This is the power of parody.

The ideal of free speech, and uninhibited criticism in particular, lies at the heart of the Enlightenment philosophies revered by the framers of the American Constitution and expressed in the First Amendment. However, the practice of criticism specifically through parody comes into conflict with another sacred American tradition: free enterprise. Because parodies are, by definition, derivative works which imitate or copy their subjects, they must appropriate or refer to ideas and symbols belonging to businesses or individuals and vital to their ability to make a profit. Legal scholar Richard Posner actually characterizes this imitation or copying as "stealing,"[2] and many businesses and individuals in modern America would agree, arguing that expressions of parody violate their rights to property, privacy, or reputation.

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[1] Robert C. Elliott, "The Satirist and Society," Modern Satire, Alvin B. Kernan, ed. (New York: Harcourt, Brace and World, 1962) p.148.

Historically, when such conflicts have ended up in the courts, most have fallen in the area of copyright or trademark infringement. To the frustration of many business owners, modern laws and court rulings have generally recognized parody as a form of protected speech, "deserving of substantial freedom."[3] Few allegations of actual copyright or trademark infringement have been successful against expressions of parody, particularly in recent years. The result has been an uneasy detente, in which the exact limits and nature of the gains made in favor of parody remain, in the words of the eminent copyright scholar Melville Nimmer, "mired in paradox."[4] On the one hand, those who practice the craft of parody fear expensive legal prosecution with no guarantees of protection, while on the other, those who have felt the sting of parody struggle to protect themselves against what they see as unfair and destructive use of their intellectual property.

A new weapon threatens to shift the balance of this detente, however. In response to the concerns of businesses, state legislators have developed, over the last several decades, a new aspect of trademark law called trademark dilution. Unlike infringement, dilution refers to the potential negative effect upon the value and reputation of a mark which may result from an unauthorized use. Ultimately, this raises the question most central to the practice of parody in a modern, capitalist context: may parodists use or refer to images, logos, slogans, and even the very corporate identity of their subjects, regardless of whether their work tends to undermine profits or public perception? Or will this new branch of trademark law require that expressions of parody be limited to opinions which do not undermine the carefully cultivated images and reputations of all registered businesses?

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[2] Richard Posner, "When is Parody Fair Use?" *Journal of Legal Studies* XXI (January 1992): 72.

[3] *Berlin v. E.C. Publications*, 329 F 2d 545 (2d Cir. 1964), *cited in*: Leon E. Seltzer, Exemptions and Fair Use in Copyright: The Exclusive Rights Tensions in the 1976 Copyright Act (Cambridge: Harvard University Press, 1978) p. 44.

[4] Melville Nimmer, International Copyright Law and Practice, Volume 2 (New York: Matthew Bender and Co., Inc., 1996) p. 150.

History

In the fourth century B.C., the work of poet and playwright Hegemon (lost to scholars today) was described with the word *parodia*, a variety of satire involving, "the comic imitation and transformation of an epic verse work."[5] While scholars have debated the definition of the word parody ever since, it has grown to include, "further forms of comic quotation or imitation in literature."[6] From the beginning, though, parody has referred to comedy or satire which specifically mimics a published or performed work, a recognizable artistic style, or a recognizable individual.

Approaches to both the prosecution and defense of parody have changed greatly over the centuries, as the officials adjudicating such cases have moved from a scripture-based approach (which classified most biting social satire or parody as blasphemy)[7] to a state-based approach (based on threats to the state, called sedition), and finally to a capitalistic, business-oriented approach today. It was in the course of these two latter evolutions that a distinction began to emerge between forms of critical speech which damage someone's personal reputation (libel or defamation)[8] and that which parodies published or broadcast works and/or business entities (copyright and trademark).[9] The process of discovering such legal frameworks has been a painful one in the United States, where the interests of property rights and free speech are both held as sacred.

Copyright law became the first battleground for parody, where the limits of protection were first carved out by the courts through precedent. For this reason, copyright cases are frequently cited in other areas of contested parody, such as trademark law (which has usurped copyright in the sheer number of claims related to parody) and even personal damages litigation. And because it was first and tested more thoroughly than any other area, copyright law has even developed its own doctrine, Fair Use, which first emerged in the 1950's.[10] In 1976, with the passage of 17 USC, the doctrine of Fair Use was codified into the first revision to American copyright law in 67 years.[11] Section 107 of 17 USC allows for, "the fair use of a copyrighted work...for purposes such as criticism [and] comment."[12] Parody is one of several such forms of expression which are explicitly mentioned as being exempt from the exclusive limits of use imposed by copyright protection.

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[5] Margaret A. Rose, Parody: Ancient, Modern And Post-Modern (Cambridge: Cambridge University Press, 1993) p. 280.

[6] Ibid., 280.

[7] Ibid., 105.

[8] Bruce W. Sanford, Sanford's Synopsis of Libel and Privacy, Fourth Edition (New York: Pharos Books, 1991) p. 26.

[9] "What is the Governing Law for Copyright?" Oppedahl & Larson (1995): 1 par. Online. Available: http://www.patents.com/ October, 1997.

Section 107 of the code grew from a number of court rulings this century which gradually established a four-part test to determine whether an alleged "fair use" of a copyrighted work is, in fact, permissible. No single plank of the test definitively establishes whether an unauthorized use of copyrighted material is "fair" or not -- all four must be considered together.[13] The Fair Use test examines: (1) the purpose of the use (commercial or nonprofit/educational), (2) the nature of the copyrighted work, (3) the amount and relative importance of the portion which is copied from the original work, and (4) the effect of the use upon the potential market for or value of the copyrighted work. Conspicuously absent from this list is the question of the nature of the derivative work. By concentrating on the purpose, target, scope and effect of disputed works, the Fair Use Doctrine avoids the treacherous and volatile territory of attempting to define parody on its own.

In recent decades, it has become common for businesses to register their names, logos, corporate slogans, and many other identifying features as trademarks, rather than copyrights. This is due, at least in part, to the fact that the parody has won some significant victories under the Fair Use Doctrine, to the point that parody usually prevails against claims of copyright infringement. Trademark disputes, however, do not involve the Fair Use Doctrine because the governing law for trademarks does not include a fair use exemption.[14] After more than ten years of bitter and tiresome debate, the passage of the first US law for the protection of trademark in 1891 ultimately bypassed the question of fair use.[15] Thus, modern US trademark law, also known as 15 USC or the Lanham Act, states that no one may use a trademark which has been registered to someone else (although some scholars argue that such protection is implied within the law, as will be discussed below), or even to create another mark which resembles it "when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive."[16]

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[10] The Fair Use Doctrine was first applied to an expression of parody in 1958, in the copyright infringement case of *Loew's Inc. v. Colombia Broadcasting Systems, Inc* 131 F. Supp. 165 (S.D. Cal. 1955), *cited in:* William F. Patry, The Fair Use Privilege in Copyright Law (Washington, D.C.: The Bureau of National Affairs, Inc., 1985) p. 153.. Legal historian William F. Patry calls it the "premiere parody case," because it involved the first serious attempt at a defense based on parody as a form of protected speech. Unfortunately, parody lost this premiere case, but this decision, "raised a storm of protests," according to Patry, and the judge in the case handed down an almost contradictory ruling the next year in a similar case (*Colombia Pictures Corp. v. National Broadcasting Co.* 137 F. Supp. 348 (S.D. Cal 1955), *also cited in* Patry., 158.)

[11] Leon E. Seltzer, Exemptions and Fair Use Copyright: Exclusive Rights Tensions in the 1976 Copyright Act (Cambridge: Harvard University Press, 1978) p. 1.

Confusion, therefore, has emerged as the central issue in cases of alleged trademark infringement through parody. The courts have ruled that if a reasonable person might have been confused about whether the use of a trademark in a parody was authorized by its owner, the trademark owner's rights have been infringed. By arguing that an expression of parody may confuse consumers, businesses have been somewhat more successful in defending against unwanted use of their names and identities than by claiming copyright infringement. Even so, confusion on the part of consumers is difficult to prove. Out of the three best known and most widely cited cases to be heard at the Federal level in this decade, only one specific example of a case of consumer

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[12] "Title 15" Publisher unknown. (1997): Online. Available: gopher://hamilton1.house.gov/11d%3A/uscode/title17/sect10

[13] Nimmer, 150.

[14] "Title 15" Publisher unknown. (1997): Online. Available: gopher://hamilton1.house.gov/11d%3A/uscode/title15/sect22

[15] Aubert J. Clark, The Movement for International Copyright in Nineteeth Century America (Westport: Greenwood Press Publishers, 1960) pp. 118-181.

[16] "Title 15" Publisher unknown. (1997): Online. Available: gopher://hamilton1.house.gov/11d%3A/uscode/title15/sect10

confusion was offered by any of the plaintiffs.[17] Meanwhile, several courts[18] have noted that cases of parody do not really fit the seven-point test for confusion as a hinge factor which has been developed through trademark precedent. After all, the whole point of parody is to invoke the subject recognizably, but also to modify it enough to create comment upon the original. Confusion with the original, then, would tend to undermine the argument that an infringing work really is a parody, while lack of confusion does not really address the question of whether a clear case of parody may still infringe on a trademark owner's rights.

Legal scholar Robert Denicola, along with several others, has suggested that the Fair Use Doctrine developed within the tradition of copyright law may offer the best guidance, even to disputes in the area of trademark infringement.[19] In fact, Denicola takes the relatively radical stance that a kind of fair use protection is implied in Section 33(b)(4) the Lanham Act, which allows that a registered name, term or device may be "used fairly and in good faith" if it refers to a person's name, goods, or a geographical origin that are common to both the registered owner and others. Thus, for example, People Magazine could not claim trademark infringement by any other business which refers to their product as a magazine, in spite of the fact that the word "magazine" is a part of that trademark. Denicola further argues that this well-established example of what he calls fair use in trademark, "should thus include any use that does not create confusion of source or otherwise misrepresent the characteristics of the user's goods or services."[20] And with this claim, Denicola begins to extend his defense of parody beyond the area of simple trademark infringement and into the newest legal battleground sought out by beleaguered intellectual property owners: trademark dilution.

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[17] Confusion was demonstrated in the form of a letter, from Mr. Charles L. Sipp to the Pillsbury Company, expressing outrage that the company would allow its dough boy to be depicted in what he perceived as an obscene situation (how Mr. Sipp happened to discover this depiction in the pages of "Screw" magazine is not mentioned in the court record). *Pillsbury v. Milky Way Productions*, 8 Med. L. Rptr. 1021-1022, based on Ga. Code Ann. § 106-115.. The other two cases were *Tin Pan Apple, Inc. v. Miller Brewing Co., Inc.*, 737 F. Supp. 826 (S.D.N.Y. 1990), and *Eveready Battery Co., Inc. v. Adolph Coors Co., Coors Brewing Co.*, 765 F. Supp. 440 (N.D. Ill. 1991), *cited in* Alexander Alben, "The Man in the Pink Bunny Suit Battles the False Fat Boys -- Growing Confusion in the Application of Fair Use to Commercial Parodies in Eveready Battery Co. v. Adolph Coors Co. and Tin Pan Apple v. Miller Brewing Co.," *Tort & Insurance Law Journal* XXVII: 3 (Spring, 1992): 555.

[18] *Eveready* and *Pillsbury*.

[19] Robert C. Denicola, "Thoughts on Trademark," *Law and Contemporary Problems* 59 (Spring: 1996) 75-92.

Dilution of a Trademark

Trademark infringement litigation has not provided businesses with the degree of protection from unwanted parody that some people had hoped. Therefore, in 1995, the U.S. legislature attempted to strengthen protections trademark owners with the Federal Trademark Dilution Act (FTDA), which President Clinton signed into law on January 16, 1996. The bill added a new portion to the Lanham Act, Section 43(c), which reads, in part:

> The owner of a famous mark shall be entitled, subject to the principles of equity and upon such terms as the court deems reasonable, to an injunction against another person's commercial use in commerce of a mark or trade name, if such use begins after the mark has become famous and causes dilution of the distinctive quality of the mark[21]

Key terms in this short passage include "famous," "commercial use," "distinctive quality," and of course, "dilution." The law itself provides a definition of dilution as "the lessening of the capacity of a famous mark to identify and distinguish goods or services,"[22] but this description has been widely regarded as so unclear that it has been restated in a variety of ways, ranging from "the gradual 'whittling away' of the mark's distinctive quality," [23] to "a kind of leeching of the good will of a famous mark," [24] to "a 'cancer-like growth...which feeds upon the reputation of an established distinctive trademark.'"[25] As for the other terms, questions of what qualifies a trademark as "famous" and what constitutes "commercial use" have already launched several suits (as will be discussed further in the Court Interpretations section, below) but none of these cases have reached the circuit court level.[26]

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[20] Denicola, 91.

[21] 15 USC Sec. 1125 (01/16/96)

[22] 15 USC Sec. 1127 (01/16/96)

[23] Frances G. Smith, "The Federal Trademark Dilution Act of 1995," *Journal of the Patent and TM Ofc. Society* 78 (no. 6: 1996) 420.

[24] Jane C. Ginsburg, a professor at Columbia University School of Law, cited in Dominic Bencivenga, "Trademark Dilution: Attorneys Long for Guidance on Proving Erosion," *The New York Law Journal*, April 3, 1997, p.1.

Arguably, the phrase in Section 43(c) which pertains most to issues of parody is the one that protects the "distinctive quality" of marks. Currently, no one knows what the long-term effect of this language will be upon parodists who use registered trademarks because no cases of this kind have (yet) been filed. Nevertheless, several critics of the legislation have issued some dark predictions about what will happen if companies are able to obtain injunctions against those whose expressions are expected to tarnish the "quality" of their intellectual property. Law professor Kenneth Port harshly criticized the FTDA before its passage, claiming that it, "creates copyrights in the idea of the trademark," or "super trademarks" which are "irrational" and "unnatural" in expanding intellectual property rights.[27] Port argued that the (then) proposed amendment, "extends to the idea of the mark in the minds of the consumer and other manufacturers even in abstract form. Under dilution theory, the trademark holder not only controls the expression of the mark, but also attempts to control the manner in which consumers or other manufacturers perceive of the mark."[28]

On the other side of the debate, some advocates of the law might actually agree with Port, such as Dale M. Cendali, a partner at O'Melveny & Myers LLP, one of several attorneys practicing in the field of trademark litigation who welcomed the FTDA. "It has chilled some infringement," Cendali says, praising the way that the amendment effectively strengthens the existing rights of trademark owners. She adds that claiming dilution, "used to be something at the tail end of a complaint ...now it's at the front. It reflects the fact that trademark is recognized increasingly as an important intellectual property right."[29] Likewise, in an article for The Trademark Reporter written just before the bill's introduction into congress, attorneys Bruce Keller and David Bernstein extolled the potential of "bringing suit...to warn off other parodists."[30] A similar sentiment seems to prevail at the US Patent and Trademark Office, which announced the passage of the new law along with the observation that, "the owners of famous marks have expended considerable expense, time, and effort in familiarizing the public with their marks, and this energy deserves to be rewarded." [31]

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[25] quoted in Kenneth Port "The 'Unnatural' Expansion of Trademark Rights: Is a Federal Dilution Statute Necessary?" *Seton Hall Legislative Journal* 18 (1993): 435.

[26] Robert C. Scheinfeld and Parker H. Bagley, "Patent and Trademark Law: Dilution Update; Antitrust Reversal," *New York Law Journal* (March 25, 1998): 1.

[27] Port, 482.

[28] Port, 485-486.

But does this "reward" for giant corporations such as Dupont, Buick, and Kodak (which were named as examples by Senator Carlos Moorhead, Chairman of the Subcommittee on Courts and Intellectual Property, during legislative hearings[32]) come at the expense of the First Amendment? In the grand tradition of all politicians, federal legislators have made several and contradictory promises on this point. Moorhead's committee, when introducing the FTDA to the whole Senate, claimed that it would protect against, "all forms of dilution recognized by the courts, including disparagement."[33] Based on what they had heard from the bill's sponsors, the International Trademark Association (ITA) published a glowing report to its constituents, promising an end to: "either the blurring of a trademark's product identification or the tarnishment of the affirmative associations a trademark comes to convey." Furthermore, the ITA offered this definition: "'Tarnishment' arises when a famous trademark is linked to products of shoddy quality or portrayed in an unwholesome or unsavory context likely to evoke unflattering beliefs about the owner or its products."[34] Such an expectation was not unreasonable at all, because protection from this kind of "tarnishment" had been one of the primary goals of similar laws passed in 30 state legislatures starting in the 1960's.[35]

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[29] Bencivenga, 1.
[30] Bruce P. Keller and David H. Bernstein, "As Satiric As They Wanna Be: Parody Lawsuits Under Copyright, Trademark, Dilution and Publicity Laws," *Trademark Reporter*, 85 (May, 1995): 261.
[31] Smith, 420.
[32] Ibid.
[33] Denicola, 88.

On the other hand, claims of tarnishment based on state trademark dilution laws against expressions of parody have not succeeded very often in federal courts, as discussed below. In fact, a bill similar to the FTDA was proposed and then dropped in 1988 when concerns about First Amendment rights were raised. In the course of that debate, and in the years that followed, groups such as the Trademark Review Commission and the American Bar Association studied the problem[36] and recommended that a distinction be made between tarnishment (including such slippery concepts as "unwholesome context" or "unsavory beliefs") and blurring, which is limited to the "likelihood of confusion, mistake, or deception." Following this advice, sponsors of the 1995/1996 bill incorporated only the blurring language into the FTDA, and also added a fair use exemption, Section 43(c)(4):

> The following shall not be actionable under this section:
> A) Fair use of a famous mark by another person in comparative commercial advertising or promotion to identify the competing goods or services of the owner of the famous mark.
> (B) Noncommercial use of a mark.
> (C) All forms of news reporting and news commentary.[37]

In addition to this exemption, federal legislators also imposed a heavy burden of proof on trademark owners, by requiring that they must prove that the person against whom the injunction is sought willfully intended to trade on the owner's reputation or to cause dilution of the famous mark. Practicing attorney Ethan Horwitz points out that, "while disparagement is likely to be obvious, the real tough one to prove is diluting the distinctive quality of the mark."[38] If such intent can be demonstrated, however, the act also allows for monetary relief along with injunctive relief.[39]

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[34] INTA Special Report 1 (Jan. 1996) cited in Ibid.

[35] Early references date back to Frank Schechter in 1924, as mentioned in Port pp. 437-438. Massachusetts was first state to pass a dilution statute (also in Port p. 439).

[36] Denicola, 89.

[37] 15 USC Sec. 1125 (01/16/96)

In this way, the authors of the FTDA attempted to balance the interests of both advocates of free speech and advocates of stronger trademark protections, while promising the best of both worlds to everyone -- especially parodists -- as described by legal scholar Robert Denicola: "in virtually identical language, sponsors in the House and Senate promised that the bill would 'not prohibit or threaten noncommercial expression, such as parody, satire, editorial and other forms of expression that are not a part of a noncommercial transaction.'"[40] This has satisfied some critics of state dilution laws, such as Melanie Routh of Rutgers University, who concludes, "the First Amendment concerns were also solved when the legislators added language exempting fair use of a famous mark in a comparative commercial advertisement, non-commercial use of a mark, and all forms of news reporting and news commentary from the reach of the dilution statute."[41] However, Routh may be overly optimistic about the application of this section to all First Amendment concerns, such as that of parody, which lawyers and literati alike might describe as commentary, but probably not as news. The question of commercial use may also return to haunt trademark parodies in the future, although a recent Supreme Court ruling in the area of copyright sent a clear signal that parody merits liberal protection, even in commercial contexts (see Court Interpretations, below).

Moreover, Routh herself casts some doubt on the validity of the distinction between tarnishment and blurring attempted by federal legislators. "It is unlikely, however, that this semantic difference will have any effect on how courts interpret the Act,"[42] she writes. If she is correct, parodists may find little or no exemption for their work in the FTDA for reasons pointed out by attorneys who specialize in representing companies against such use of their trademarks: "it is the second branch of dilution law -- tarnishment -- on which most parody victims rely. By their very nature, parodies make fun of the objects of their ridicule. If done in a bawdy manner, the parody may run afoul of dilution laws -- not because consumers would be confused into believing that the victim was the source of the distasteful parody, but rather because the parody erodes the value of the mark by associating it with sex, drugs or violence."[43]

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[38] Bencivenga, 1.
[39] 15 USC Sec. 1125 (01/16/96)
[40] Denicola, 91.
[41] Melanie M. Routh "Federal Trademark Dilution Act." *Rutgers Law Review*, 50 (no. 253, 1997): 282-283.

Thus, with both sides proclaiming victory, what exactly does the new federal against trademark dilution law accomplish? Analysts on all sides seem to agree that protection for trademark owners against infringement or deceptive use of their intellectual property has been strengthened. Kenneth Port argues that the FTDA offers little real distinction between blurring and traditional infringement beyond the fact that blurring now seems to carry heavier consequences and apply to broader contexts.[44] Denicola sums up the value of the federal law in this way: "One thing is clear. Under the amendment's definition of 'dilution,' our corner of the world is now safe from DuPont shoes, Buick aspirin, and Kodak pianos....The amendment is (and should be) limited to DuPont Shoes -- to a loss of distinctiveness occasioned by a subsequent use of the mark as a trademark to identify another's goods or services."[45]

Ultimately, while the FTDA's passage has generated a great deal of pomp and speculation, ("it may be said without fear of contradiction that the biggest news in trademark law this year was the entry into force of the Federal Trademark Dilution Act of 1995...[which] represents a high-water mark in federal recognition of trademark rights..," gushed one attorney in the New York Law

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[42] Ibid.

[43] Keller and Bernstein, 252.

[44] Port 456.

[45] Denicola, 87-88.

Journal),[46] it does not yet provide much basis for either trademark owners or parodists to feel completely protected from each other. And so, the uneasy detente continues, with both sides looking to the courts for answers, and with issues of free speech and fair use still hanging in the balance.

Recent Social and Political Context

In the United States, ongoing efforts by the Supreme Court to map out and stabilize the practical limits of the First Amendment have resulted in much clearer and more specific legal boundaries of protection for parody than ever before in Western history. Nevertheless, dangerous ambiguities within both the law and its judicial interpretation still exist, along with confusing inconsistencies in the application of the law.[47]

Several factors are unique to the question of parody in the late 20th century. New technologies for reproduction (film, video, sound recording, lithography, digitization, and many others) have made the "appropriation" of intellectual property easier than ever. The gradual transformation of books, paintings, films, and other representational media to digital information has caused some artists and philosophers to question the true nature of art. Modernists such as Andy Warhol and Roy Lichtenstein "transformed" soup can labels and comic book panels into gallery paintings, while also challenging the traditional legal definition of painting itself by issuing their work in large series of prints, none of which may be identified as a single "original." Rap musicians have also used emerging technology to create new works from existing ones by "sampling" famous songs and memorable sections from other musicians as a form of either tribute or commentary. And above all, the broadcast format of television has provided the greatest source of legal disputes over expressions of parody, both in the form of humorous spoofs of well known films and cultural texts and in the form of well-known phrases, images and styles taken from other media for use in a commercial context. Thus, new technical capabilities in the areas of print reproduction, broadcast, sound and video call into question the nature of what is an original work and what is derivative, which lies at the core of copyright law as it applies to fair use.

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[46] Bencivenga, 1.

Most recently, the personal computer has led to the phenomena of desktop publishing and the Internet which make it possible for people to disseminate text and images to millions of readers around the world with very little investment of time and money. These media call into question the very definition of the term "publication," which once played a key role in determining the amount and nature of damages appropriate in different cases. As one British activist who has been sued for libel by McDonald's put it, "the web has given us a place where we can have a voice just as loud as McDonald's...on the Internet, it doesn't matter how much money you've got."[48]

As with all technologies, these new channels for expression offer the opportunity for both constructive and destructive applications. One might call it the "Larry Flynt Syndrome" that those who make the most flamboyant and controversial use of a medium of expression often do so with a sense of humor or aesthetic that tends to offend even those who would defend them on principle. Flynt himself was involved in one of the defining cases of parody and personal libel heard at the Supreme Court level, and figures like him have been involved in the establishment of sedition and obscenity common law. Parody in its modern context has resulted in many such ambiguous and painful cases which test not only the letter of the law, but also the tolerance of the public.

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[47] Georgia Harper, "Fair Use Website." University of Texas (1997): Online. Available: http://www.utsystem.edu/OGC/IntellectualProperty/confu.htm October, 1997, par. 4.

[48] Kathleen Murphy. "Risk of Having Site: Being Mocked: Big Firms Look to Protect Their Good Name." Web Week, July 8, 1996 vol. 2: Issue 9. Online. Available: http://www.webweek.com/96July8/comm/mocked.html October 1997.

For example, the "Jihad to Destroy Barney"[49] web site has been established by a group of passionate and confrontational critics of the highly successful PBS children's television show Barney and Friends, for the stated purpose of destroying the show. The Jihad mixes serious, literary criticism of the show's themes and representations and harsh, emotional invective (including allegations of mind control, social engineering, and many, even darker, insinuations), along with parodied pictures and stories based on the real television series. It is the mixture of humorous exaggeration and serious criticism which presents difficult legal questions for the Jihad, because it cannot be described as having any one, single purpose -- whether that be serious allegations of wrongdoing, parody, or nihilistic destruction of a popular television show. By modifying trademarked images of the smiling purple dinosaur with pink eyes, bloody jaws, and children's limbs trailing from Barney's mouth, the Jihad might seem an ideal candidate for claims of trademark infringement and/or dilution.

Journalist Kathleen Murphy addresses some of these questions in the context of a similar situation, as part of her article outlining some of the risks encountered by big companies on the Internet. Former K-Mart employee Rodney Fournier decided to create a site which details his complaints against his former employer. He titled his site, "K-Mart Sucks." The company was unsuccessful in its efforts to stop him altogether. However, he was instructed to stop using the trademarked logo. Fournier's response was to simply change the giant "K" on his site from red to blue. The company claimed victory, but others, including Murphy, cite the episode as an important cautionary tale for all businesses today.[50]

Indeed, the Internet has become one of the most fiercely contested arenas of trademark dispute in the past several years, and was cited as a primary motivation behind the passage of the

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[49] "The Jihad to Destroy Barney." Barney Jihad (1997): Online. Available: http://www.public.iastate.edu/~midnite/bharni/yermish.html October, 1997.

FTDA. In particular, federal legislators had hoped to settle the question of whether domain names (also known as Internet addresses, i.e. the string of letters and other characters which must be entered into a web browser application in order to access a website) are subject to existing trademark registrations. As Senator Patrick J. Leahy (D-Vt.) said during the debate at the time of the bill's passage, "it is my hope that this anti-dilution statute can help stem the use of deceptive Internet addresses taken by those who are choosing marks that are associated with the products and reputations of others."[51] Leahy's intentions for the FTDA were fulfilled later that same year when the law was cited in a Federal District Court ruling against a "cyber-squatter" named Dennis Toeppen who had made a successful small business by registering for domain names such as "deltaairlines.com" or "neiman-marcus.com" and then offering to sell them, for a profit, to the companies which would logically want them. Toeppen was ordered to relinquish the domain name he had obtained for "intermatic.com" because his use of it was found to dilute the value of an established trademark. Interestingly, Magistrate Judge Morton Denlow took care to point out that the court's decision was based only on trademark dilution -- not infringement, and not on some other legal prohibition against "cyber-squatting."[52] Denlow also ruled that Intermatic's name qualified as "famous" under the trademark dilution act, which some legal analysts have disputed[53]

Another element unique to the late 20th century context of parody is the changing role and emerging significance of popular culture. In compiling an analysis of all the intellectual property litigation involving parody he could find in American legal history, Richard Posner made an intriguing discovery: every single case involved works of popular culture, rather than high culture

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[50] Murphy, par. 9.

[51] Blanc, Williams, Johnston and Kronstadt, eds., "Domain Name Violates Trademark Dilution Act, District Court Rules," *The Computer Lawyer,* 13 (Nov., 1996): 20.

[52] Ibid.

[53] Bencivenga, 1.

(also revealing was the fact that he could only find a total of 59 cases).[54] Of course, such an extreme result immediately calls into question Posner's definition of high versus popular culture. Still, Posner's research does illustrate the changing and contested nature of expressions of parody, in that almost all of the legal disputes in the United States have taken place within the past few decades and have been centered on untraditional forms of cultural expression.

Much of the expression which might be described as parody addresses the inherent tensions between classes, although such conflict may not be immediately visible on the surface. The rich and powerful have been traditional targets for humorous comment precisely because such expression represents a form of resistance beyond the traditional instruments of power such as money or weapons. However, artists who use parody to comment upon issues and ideas which may arouse the wrath of large corporations must carefully weigh the legal risks they may be taking, sometimes armed with only sketchy ideas of what may or may not be safe. Witness this typical discussion which was posted on an Internet newsgroup by and for professional cartoonists:[55]

> **Bob Staake**: [What is] acceptable in fine art, [is] verboten in commercial illustration. Frankly, I've viewed Warhol as a genius in his ability to make the public redefine THEIR assessment of what art is and what isn't.
>
> **Ted Goff** - Let's see... if I drew a cartoon that appropriated Garfield and Blondie and a couple of James Thurber's characters it would probably be a stupid cartoon and I'd be criticized for the theft of the drawings. But if I did something very clever with those characters then perhaps I'd be admired for my creativity.
>
> **Bob Staake** - Painting a box of Brillo can be viewed on the surface as the act of a madman, a joker, or both -- unless you fathom the implication of committing the object to artistic interpretation on a canvas for (theoretically) all eternity. However, this is not to say that I don't agree that both (primarily Warhol) didn't know how to "play the game" in a tongue and cheek manner (you are correct on this point as he most certainly did). The fact that he successfully "played the game" is in an of itself an artistic statement.
>
> **Zach Trenholm, son of well-known collagist Buster Cleveland** - As creative people, our work has been subtly or obviously influenced by others & this process continues for life to some extent. Sampling or appropriation I think, is just an extension of this, albeit in a more direct or tangible way.

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[54] Posner, 76-77.

[55] "Appropriation of Images." Ted Goff Website (1997): Online. Available: http://www.tedgoff.com/wwwboard/index/messages/swipingimages071297.html October 1997.

Artists and writers, whose work offers very little financial reward in the first place, fear unpredictable and yet severe prosecution by cadres of well-funded corporate lawyers. The same group of cartoonists quoted above referred to themselves as "dead meat" [56] if they cross vaguely drawn lines regarding type and frequency of use. Comments such as these are common: "...never underestimate the possessiveness, greed and spitefulness of the studios who own these trademarks. Disney, for example, absolutely destroyed a couple in Massachusetts who dared to open a restaurant called 'Pinocchio's,' in which they had a picture of the Disney character on the wall. They weren't simply asked to cease and desist; they were sued into financial ruin!" [57] Such a widespread perception of threat obviously creates a significant potential for a chilling effect.

Moreover, in her review of Jane Gaines' Contested Culture, Diane Waldman points out that as the legal definition of intellectual property grows to include more and more elements of culture, it, "increasingly places the signs of our common cultural heritage under threat of commodification and privatization."[58] Waldman and Gaines both argue that the increasingly economic framework within which expressions of social commentary are judged may tend to affect the cultural significance, and thus the meaning, of those works.

In the interest of social stability or protection of free trade, nations such as England and the United States have created laws in an attempt to define and regulate forms of speech which the majority or the ruling class perceived as dangerous, hurtful, and even morally wrong. However, as Leonard Feinberg points out, in spite of such valid concerns, broad use of the law in an attempt to censor writers of parody has proven not only ineffective, but counterproductive: "what it finally comes down to is that censorship determines not whether satire is written but the form of satire that is written, by requiring varying degrees of subterfuge...[satirists] have had to choose different techniques to cope with the restrictions of that society."[59]

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[56] "Parodies" Ted Goff Website (1997): Online. Available:
http://www.tedgoff.com/wwwboard/index/messages/copyrightissueoncomicparodies1.html
[57] Ibid.

In fact, parodists today enjoy relatively liberal legal protection, though they may fear unfair prosecution. In addition to the special status granted to parody by the Fair Use Doctrine in the area of copyright, libel laws (which vary from state to state) "fundamentally protect criticism -- no matter how caustic or incredible," although protected criticism must not allege unproven facts or be "malicious,"[60] which does leave room for interpretation. Likewise, traditional trademark infringement and even trademark dilution actions have ended up being actually counterproductive, as practicing attorneys Bruce Keller and David Bernstein point out: "just as parodies are designed to attract attention with their humor, lawsuits against parodies also can attract attention, and that attention sometimes can backfire on the plaintiff."[61]

Ultimately, entrepreneurs and public figures have found themselves often powerless to defend their reputation and their intellectual property against what they may experience as the most vicious kind of personal and derisive portrayals. They accurately perceive that damage to their personal or professional reputations can seriously affect their ability to compete in an unforgiving market. Georgia Harper of the University of Texas describes the sentiment among business owners at a recent fair use summit: "copyright owners thought they were giving away too much …[cooperation between owners and those who favor fair use] depends upon how soon copyright

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[58] Diane Waldman, "Lawsuits of the Rich and Famous: Privacy, Property, and Popular Culture," *Quarterly Review of Film and Video* 14:4 (1993): 78.

[59] Leonard Feinberg, The Satirist: His Temperament, Motivation, and Influence (Ames: Iowa State University Press, 1963) pp. 308-309.

[60] Sanford, 18.

[61] Trademark Reporter, 260

owners figure out how to make a living in the electronic environment. They are really scared... It's their livelihood after all."[62]

Court Interpretations

Legally, the passage of the FTDA in 1996 represents a watershed event for trademark dilution as a legal argument. Some individual states had begun to write dilution protections into their laws as early as the 1960's. Very few claims made on the basis of such clauses were ever tested in federal courts, however, with the most notable examples only occurring in the 1980's. In fact, legal professor Kenneth Port reports that "only about two percent of dilution cases brought to the federal circuit courts of appeal since 1977 have resulted in a sustained injunction based solely upon dilution." Furthermore, Port (writing in 1994) claimed that most courts at that time considered state trademark dilution statutes to be generally overbroad, which resulted in an attitude which was "quite hostile to dilution," and tended to ignore such laws.[63] For this reason, it makes sense to divide the history of trademark dilution litigation into that which came before the passage of the federal law, and that which came after.

Before the FTDA

The year 1981 turned out to be a rough one for parodists, who found themselves among the losing two percent of dilution defendants, as measured by Port during that period. In a span of just six months, expressions of parody suffered two high-profile defeats in the courts, where they also encountered a deep disdain for very idea of mocking well-known, respected corporate trademarks.

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[62] In September, 1994, the Conference on Fair Use (CONFU) convened negotiations among the Clinton Administration's National Information Infrastructure Initiative, the Working Group on Intellectual Property Rights in the Electronic Environment, and copyright stakeholders to establish voluntary guidelines for the fair use of electronic materials in a variety of nonprofit educational contexts. Harper, par. 3.

[63] Port, 449.

First, High Society magazine lost a claim of straightforward trademark infringement brought by the estate of Edgar Rice Burroughs for a featured satire depicting Tarzan and Jane discussing and engaging in erotic situations.[64] The US Southern District Court of New York required that the defendants post an immediate $50,000 deposit on the day of judgment, to be applied toward a court-supervised recall the more than 500,000 copies of the offending issue from wholesalers, distributors and subdistributors. "Plaintiff has during the many years since the creation of the character successfully striven to maintain its characters, Tarzan and Jane, as persons of high moral standards, admirable traits of character, and clean and attractive appearances and portrayals," wrote Justice Potlack in a brief, stinging opinion.[65]

"The defendant's purported defense," as Justice Potlack referred to it, hinged on the testimony of High Society's vice-president, Ira Kirschenbaum, who argued, "that the plaintiff has created an erotic atmosphere of a virile male living in an out-of-wedlock relationship and fathering an illegitimate child...[and] that the article is a contemporary commentary based on a newsworthy character...as the public might well perceive it in view of the plaintiff's own erotic exploitation."[66] Kirschenbaum (the only witness presented by the defense) also admitted that the magazine was currently and would continue to be directed "to young children" as an audience. An outraged Justice Potlack called High Society as, "a sex magazine containing lewd, vulgar, sexually explicit photographs and articles...[which] trespass on the plaintiff's rights in a most distasteful and crude manner."[67]

While the defendants may have failed to charm the judge, they were wise enough to present their single, best hope for protection under the First Amendment by claiming, "a constitutionally protected right of social commentary, and that the plaintiff is not free from criticism or ridicule."[68] This was by no means a guaranteed defense against alleged trademark infringement, however, at a time when such cases tended to focus on the issue of whether consumers would be confused by the unauthorized use of a registered mark, without consideration of free expression or the Fair Use Doctrine found in copyright law.

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[64] *Burroughs v. High Society*, 7 Med. L Rptr. 1863-1864.
[65] Ibid., 1863.
[66] Ibid.
[67] Ibid.

In the end, Justice Potlack did fault the erotic Tarzan parody as confusing to consumers, stating flatly, "everyone would believe that the mark owner approved the use of the trademark." But his ruling of trademark infringement did not end with the classic issue of confusion. He went on to find that the "reputation and good will" of movie and TV producers, publishers, Burrough's literary works, and even the general public, "have undoubtedly been besmirched, tarnished, and debased by the defendants and their magazine."[69] This not only amounted to "blatant infringement" under the Lanham Act, but also "dilution and unwholesome setting." With these latter words, Justice Potlack became one of the earliest and one of the most enthusiastic jurors ever to apply the concept of dilution against an expression of parody, even doing so in a case where nothing but simple infringement had been charged.

By contrast, Justice O'Kelly of the US Northern District Court of Georgia scrupulously avoided any recriminatory language or liberal interpretation in a very similar case later that year. Justice O'Kelly's ruling, involving the Pillsbury dough boy, was based on an explicit allegation of trademark dilution, under the Georgia "anti-dilution" Statute.[70] "All the plaintiff need show to prevail is that the contested use is likely to injure its commercial reputation or dilute the distinctive quality of its marks," the court wrote, in a dispassionate ruling that upheld dilution as one of only two successful claims out of a total of eight copyright, trademark and defamation charges.

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[68] Ibid.

[69] Ibid, 1864.

The case centered on a magazine called "Screw," which published a joke advertisement depicting "Poppin' Fresh," Pillsbury's trademarked and copyrighted mascot, having sex with "Poppie Fresh," a female version of himself. In considering the motion filed by Pillsbury against the magazine's publisher, Milky Way Productions, the court agreed that this case represented a question of fair use, but also refused to consider whether the image in question in fact qualified as satire or parody, noting that, "these two works of art do not have a fixed definition even among accomplished literary critics."[71] Without any special consideration for parody, then, the *Pillsbury* court still ruled that copyright infringement had not occurred because the plaintiff was unable to show any significant evidence that the value of, or market for, the original had been measurably affected by the parody.[72]

In examining the trademark infringement claims, the court employed a very systematic analysis, using the traditional seven-point test for confusion outlined in the Lanham Act. The court recognized that many of these factors hold little meaning in the context of a parody which seeks to fool the audience into believing that it is real, even as it includes elements which belie its sincerity. For this reason, the *Pillsbury* court concentrated on only two parts of the seven-point test: the defendant's intent and evidence of actual confusion.[73] For the latter, as mentioned above, the court was not persuaded that it had seen any substantial proof of widespread consumer confusion. As for the defendant's intent, the court cited the defendant's testimony that he was trying to, "have a good time and make fun of," the dough boy rather than trying to "confuse, mislead, or deceive the

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[70] *Pillsbury* 1027.

[71] *Pillsbury* 1021.

[72] Interestingly, the court also foreshadowed later rulings in the area of copyright by narrowly interpreting the commericial nature of Screw magazine. The Pillsbury parody did not qualify as commercial, the court ruled, because although the magazine is sold for profit, the fake ad was located inside as part of the editorial content rather than on the front cover where it might have been used to increase sales. *Pillsbury* 1022.

[73] Ibid., 1024-1026.

public," which is the real focus of the Lanham Act proscriptions. Based primarily on these factors, the court determined that Pillsbury's trademark had not been infringed.[74]

The ambitious assault waged by Pillsbury's legal team against the publishers of Screw did not stop at copyright and trademark claims, however. They went on to invoke what the court described as "a heretofore unheard of common law tort" called tortious tarnishment. According to the plaintiffs, this kind of tarnishment extended beyond the scope of Georgia's dilution law, as when, "the defendant has so altered the image of plaintiff's trade character [sic] (one of which is Pillsbury's corporate spokesman) as to make them distasteful or even repulsive to a significant segment of Pillsbury's customers."[75] Such fancy legal maneuvering did not impress the court however, which was unable to find any precedent for such a claim, either in cases cited by the Pillsbury team, or in a search of its own. "Nor is the court inclined to accept the plaintiff's invitation to plant this first seed," Justice O'Keefe wrote, rejecting the claim on the grounds that, "in the court's judgment any wrong done to the plaintiff's commercial reputation can be redressed adequately by existing statutory and common law courses of action." But O'Keefe's words came too late; the seed had already been planted at least six months earlier, in Justice Potlack's bombastic ruling against High Society.

And that seed came to fruition within seven years, when tarnishment had become such a familiar term among both lawyers and legislators that it was included in the first, aborted attempt at an FTDA. Meanwhile, legal protections for parody in the context of trademark had suffered a serious blow through these early cases. This was balanced, however, by a general trend toward greater protection of parody continued in the area of copyright litigation during this time.

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[74] Ibid.

[75] *Pillsbury*, 1026-1027.

By the late 1980's, the idea of trademark dilution was well-known, and had been incorporated into the laws of more than half the states.[76] Trademark attorneys Bruce Keller and David Bernstein conducted a survey of nearly all recent federal trademark cases involving expressions of parody and found that the rate of cases increased steadily between 1969 and 1995, with only six of the total thirty four filed before 1980.[77] Keller and Bernstein identify three branches of legal approach to the prosecution of parody through trademark law: likelihood of confusion, trademark dilution (specifically tarnishment, rather than blurring, which they argue does not apply to parody), and parody advertising. Justice Potlack's ruling that "everyone" would believe that the Burroughs estate had consented to a pornographic depiction of Tarzan would fall into the first category, and his finding that the characters were "besmirched, tarnished and debased" would fall into the second category. Of course, many cases may involve more than one approach at a time.

Interestingly, around the time that the first iteration of a federal trademark statute was being attempted, the courts began to show greater leniency toward expressions of parody in Keller and Bernstein's first category, confusion, while remaining fairly protective of the second category, tarnishment of famous marks. As for the third category, parody in the context of advertising, this aspect of contested parodies tended to raise the sticky issue of whether the work in question counted as pure expression or whether it had a commercial use which put it into some form of competition with the trademark owner. Thus, the results in the context of advertising were mixed, causing some anxiety among plaintiffs, defendants, and the courts themselves.

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[76] Keller and Bernstein, 251.
[77] Ibid., 248-250.

A typical example of the first category would be a 1989 action against a parody version of the popular series of study guides called Cliffs Notes.[78] A parody book series, called Spy Notes, mimicked some of the graphic elements, colors, and front cover style of Cliffs Notes, but with some significant alterations. Each of the parody books was marked as "a satire" no less than five times in bright red lettering on the front cover, and four times on the back. Furthermore, the parody books used more colorful language (promising to be "even funnier than the originals"), a different overall structure, and were intended to be sold in collections of ten volumes which were labeled with a different name and logo than the originals. Noting these (and more) distinctions between the source and derivative works in detail,[79] the court found that the parody, "raises only a slight risk of consumer confusion that is outweighed by the public interest in free expression, especially in the form of expression that must to some extent resemble the original."[80] Likewise, in 1992, a magazine which spoofed the Farmer's Almanac on its cover was found innocent of both trademark infringement and trademark dilution claims.[81]

The second category, tarnishment, continued to be the most unfriendly terrain for parodists. In 1989, Vibra Labs was sued for packaging condoms to resemble American Express cards (complete with the trademarked slogan, "don't leave home without it").[82] Surprisingly, this relatively unaltered appropriation of a very famous logo and accompanying slogan was not found to be confusing as to source. It was, however, found to compromise the "distinctiveness" of the mark, and tarnish the "good will" of American Express, and so was enjoined as trademark dilution.[83]

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[78] *Cliff Notes, Inc. v. Bantam Doubleday Dell,* 16 Med. L. Rptr. 2289. Note that the spelling of Cliffs Notes without an apostrophe (as in Cliff's Notes) is used here, in accordance with the practice of the court in this case, although the court noted that both spellings are used by the plaintiffs.

[79] Ibid., 2290.

[80] Ibid., 2294.

[81] Keller and Bernstein, 253

[82] *American Express Co. v. Vibra Approved Laboratories Corp.* 10 USPQ2d 2006 (SDNY 1989), cited in Ibid., 252.

[83] Keller and Bernstein, footnote #49, pp 249-250.

Far more surprising, however, was a 1994 judgment against a humor magazine called Snicker which used a parody of an Anheuser-Busch ad to comment upon a recent oil spill on a tributary of the Mississippi River, upstream from the plant which produces Michelob beer.[84] Changing the trademarked name "Michelob Dry" to "Michelob Oily," the fake ad ran with a disclaimer identifying it as a "Snicker Magazine Editorial" on the right side of the page.[85] The court minimized the importance of the disclaimer by noting that it was written in "extremely small text,"[86] and found that the publisher, Balducci Productions, had, "if not an intent to confuse, at least an indifference to the possibility that some consumers might be misled by the parody."[87] To bolster this argument, the plaintiffs provided a survey of 301 beer drinkers or purchasers who claimed to look through magazines or newspapers periodically. Of these, fifty eight percent believed that the magazine "did have to get permission to use the Michelob name," while fifty six percent thought that Michelob would have to approve the use of its logo and other symbols. By contrast, only three and a half percent of the respondents reported that they noticed the editorial disclaimer.[88]

But confusion was not the real basis for the Eighth Circuit Court of Appeals' decision against the magazine. Citing *Cliff Notes*, the court called for "balance" between the interests of free speech and the public's right to avoid being confused: "...[C]onfusion might have been tolerated if even plausibly necessary to achieve the desired commentary -- a question we need not decide," wrote Justice Gibson for the court. "In this case, the confusion is wholly unnecessary to Balducci's stated purpose."[89] The publishers had fatally wounded their own case on this point, when they admitted that their primary goal was to comment upon "environmental pollution," and to a lesser extent, the beer manufacturer's decision to close the plant for three days "as a precaution" following the spill. Last in priority, the only comment Balducci intended upon Anheuser-Busch as a company was that its brands were "proliferating." Based on these priorities, the court determined that Balducci had borrowed too much from the trademark owner because even the Fair Use Doctrine in the copyright tradition, "does not entitle the parodist to copy everything needed to create the 'best parody;' rather, the parodist may copy only that portion of the protected work necessary to 'conjure up the original.'"[90]

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[84] Lyle Denniston, "This Slogan Isn't Necessarily For You." *Washington Journalism Review*, 17 (March, 1995): 54.
[85] *Anheuser Busch Inc. v. Balducci Publications*, 22 Med. L. Rptr. 2001-2008.
[86] Ibid., 2002.
[87] Ibid., 2004
[88] Ibid., 2002
[89] Ibid., 2006

Legal scholar Richard Posner offers a distinction which helps to shed some light on the Eighth Circuit's ruling in *Balducci*. Posner argues that parody should be used only to comment directly upon its subject, not to appropriate the style, structure or content of one work for use as a weapon in criticizing some other subject.[91] His argument was developed through an analysis of copyright litigation, based on cases such as *Elsmere Music v. N.B.C.*,[92] in which the television program Saturday Night Live substituted the words "I Love Sodom" for the well-known "I Love New York" promotional jingle. The television producers prevailed in this case, but mainly because they were able to argue that they only used as much of the original song as was necessary to conjure it up in the minds of the audience. Beyond that, substantial changes were made. Posner believes that any such use is unfair, but at the very least, he believes that a minimum amount should be taken from one work to comment on another. Justice Gibson seemed to be using just such a test when he wrote, "Balducci's desired message, or humor, presumably hinged on consumers' ultimate realization that although this 'advertisement' was based on the painstaking duplication of Anheuser-

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[90] Ibid., 2004, citing *Walt Disney Productions v. Air Pirates*, 581 F.2d 751, 758 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979)

[91] Posner, 73-74.

[92] *Elsmere Music v. NBC*, 5 Med.L.Rptr. 2455-2458.

Busch's marks, it was in fact a parody or editorial parody."[93] By taking so much from the trademark owner's symbols, then, the magazine actually fooled some consumers into missing the real joke (about pollution), and ended up created an unintended impression that Michelob Beer is tainted with oil.

And, in the process, the publishers and editors of Snicker diluted and tarnished several of Anheuser-Busch's registered trademarks. "Moreover," wrote Justice Gibson, "the tarnishment results from a negative, although vague, statement about the quality of the product represented by the trademark."[94] In the end, Balducci appealed the injunction and symbolic damages of one dollar to the Supreme Court, claiming the classic First Amendment guarantee against, "the stifling of political cartooning in a nation bred to broad freedoms of speech and the press." [95]

"Strong words, but ultimately unpersuasive," wrote Lyle Denniston, who cites *Anheuser-Busch* in The Washington Journalism Review as a prime example of the ongoing state of confusion regarding the use of trademarks in parodies.[96] The Supreme Court declined to review the case. Balducci may have been a victim of bad luck, to some extent, because the if the case had been filed only eighteen months later, after the passage of the FTDA, the omission of any explicit reference to tarnishment in that law might have helped the publisher succeed.

On the other hand, the federal law may or may not have been much help in dealing with the third and final aspect of trademarks in parody litigation -- the context of advertising. Because the "Michelob Oily" ad appeared on Snicker's back cover, *Balducci* raised the issues of commercial versus non-commercial use. And television advertisers, interestingly, have been among the first to use parody as one of their tools of persuasion, even while the nature of their craft means that they may have the most to lose when humor is turned against them.

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[93] *Anheuser Busch*, 2004
[94] Ibid., 2007
[95] Denniston, 54.
[96] Ibid.

Balancing the interests of free speech and intellectual property owners can be difficult enough in a case of pure expression or commentary, but when that expression seeks to make a profit of its own, possibly in competition with the trademark owner, the stakes are raised to a new level. This is, of course, the fundamental reason why businesses fear an unreasonably permissive attitude toward expressions of parody on the part of the courts. Legislators promised that the passage of the FTDA would insure a reasonable level of protection for valuable corporate identities, such as Michelob's, or pop-culture icons, such as Poppin' Fresh or Tarzan. But has this promise been fulfilled?

After the FTDA

As of the publication of this paper, no defendant has claimed exemption under the FTDA, based on the argument that their work is a parody. Closest in spirit and approach to such a situation are two cases identified by law scholar Melanie Routh in the Fall of 1997, as part of a review of seventeen trademark dilution cases which have occurred at the federal level in the more than two years since President Clinton signed the law into effect.[97] Both of these center on Internet web sites which exhibit and sell sexually explicit materials. In one case, Hasbro, Inc.[98] alleged that a site named "Candyland" diluted and tarnished the "innocence and wholesomeness"[99] of its children's board game which bears the same name. *Toys 'R' Us v. Akkaoui* resulted from a very similar situation, in which the giant retail chain of toy stores sought an injunction against a site called

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[97] Routh, 282-290.

[98] *Hasbro, Inc. v. Internet Entertainment Group,* No. c96-130WD, 1996 WL 84853, (W.D. Wash. Feb. 9, 1996), cited in Ibid., 288

[99] Ibid.

"Adults 'R' Us." Neither of the defendants in these cases claimed that their names were expressions of parody, and both failed under the FTDA.

Beyond these two tarnishment disputes, the cases filed under the new law have focused on fundamental issues such as whether state laws are usurped by the federal law, retroactive applications, and conflicts over consumer confusion among competitors.[100] Routh reports that a total of six issues have been raised by the cases she surveyed,[101] of which only one has much direct relevance to parody: "whether an offending mark would need to be identical to a famous mark to be actionable under the Act." The case of *Ringling Brothers-Barnum & Bailey, Combined Shows, Inc. v. Utah Division. of Travel Development*[102] revolved around a tourist campaign advertising the "Best Snow on Earth" which played upon the well known slogan of the famous circus. The court agreed that the Utah slogan did not have to be identical to the familiar "Best Show on Earth," registered to the plaintiff, and so it qualified for consideration as a possible dilution. But the defense won the case anyway with its argument that the products promoted by the two businesses involved were so different that they could not possibly compete with each other.[103] Thus, the question of the commercial, competitive nature of the derivative use has already begun to surface under the federal law, as it is likely to do again in the context of commercial parodies.

When such cases do arise, the courts will probably look to the history of trademark dilution cases as discussed above, but also to the application of Fair Use in the context of copyright because many of the most pertinent issues have already been explored there. In fact, the four planks of the Fair Use Doctrine read like a list of unresolved questions associated with dilution, tarnishment, and parody. First, what is the purpose of the derivative work -- commercial versus nonprofit, commentary or educational? This very question was raised in every one of the cases mentioned in the previous section. Second, what is the nature of the copyrighted work? This plank recalls the word "famous" which is used to qualify marks for dilution protection in the FTDA and has already been considered several times, such as in the "cybersquatting" case of *Intermatic v. Toeppen*, mentioned earlier. Third, how much was taken from the original, and what was the relative importance of the borrowed material? The FTDA addresses this concept as the "distinctive quality" of a trademark which must not be harmed by an act of dilution. Fourth, what effect will the parody have upon the potential market for the original? Once again, the commercial versus noncommercial nature of trademark parodies is recalled here, but so is the classic trademark infringement question of consumer confusion.

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[100] Steven E. Shapiro, "Use of 'Mead Data' Test Dilutes the Dilution Act: Despite Statute's Terms, Courts Inject 'Likelihood of Confusion' Into Their Analysis of 'Blurring.'" *The National Law Journal*, (Monday, May 12, 1997) p. C02.
[101] Routh, 284.
[102] 955 F. Supp. 598 (E.D. Va 1997), cited in Ibid., 285
[103] Shapiro, p. C02.

In light of the similarities between the fundamental questions facing parody in both the contexts of copyright and trademark, a look back at some landmark cases in the copyright tradition can provide some of how future trademark dilution litigation might look.

A Dispute Over Fair Use

Legal scholar Alexander Alben describes a rift of opinion which developed regarding the application of the fair use doctrine, among the Second Circuit Court of Appeal, on one side, and the Eighth and Ninth Circuits, on the other.[104] The divergence of interpretation that Alben describes reached its widest point in the early 1990's with two similar and contemporary cases that yielded two contradictory verdicts: *Tin Pan Apple, Inc. v. Miller Brewing Co., Inc.*, and *Eveready Battery*

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[104] Alben, 562.

Co., Inc. v. Adolph Coors Co., Coors Brewing Co.[105] The disagreement between these cases actually grew from several earlier rulings, including *Pillsbury*, which is cited in both the *Tin Pan* and *Eveready* decisions. Both cases share one other important characteristic: they both refer to trademark claims alongside the consideration of copyright and Fair Use, as had become increasingly common by the late 1980's and early 1990's.

In his 1992 article, Alben argued that these differing lines of interpretation ultimately posed the threat of uneven application of the Fair Use Doctrine. This worked to the advantage of copyright and trademark holders in the Second Circuit's *Tin Pan Apple* case, and to the advantage of those who might use parody for editorial comment or even some forms of commercial exploitation in the Eighth and Ninth Circuits, whose rulings were the basis of the *Eveready* decision.[106]

Tin Pan Apple involved a television commercial for Miller Beer which used actors who looked and behaved like a well known rap group, the Fat Boys. The real Fat Boys had been asked to appear in the commercial and declined. The completed advertisement humorously exaggerates the real Fat Boys' physical characteristic of fatness, and concludes with a moment in which comedian Joe Piscopo rolls across a soundstage, having become literally as fat as a bowling ball. Tin Pan Apple, Inc., which controlled the rights to all Fat Boys work and merchandise, sued Miller, the ad agency, and Piscopo for infringement of copyright, trademark, as well as invasion of privacy and libel.[107]

The court rested its decision squarely on the first plank of the Fair Use Doctrine (purpose of the derivative work, commercial, non-profit, or educational). "There is ample authority," stated

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[105] *Tin Pan Apple, Inc. v. Miller Brewing Co., Inc.*, 737 F. Supp. 826 (S.D.N.Y. 1990), and *Eveready Battery Co., Inc. v Adolph Coors Co., Coors Brewing Co.*, 765 F. Supp. 440 (N.D. Ill. 1991), *cited in* Ibid., 555.

[106] Ibid., 556.

[107] *Tin Pan Apple, Inc.* 2275.

Judge Haight for the U.S. District Court, Southern district of New York (Second Circuit), "for the proposition that appropriation of copyrighted material *solely for personal profit*, unrelieved by any creative purpose, cannot constitute parody as matter of law (emphasis added)."[108] As evidence of such authority, Haight cited another ruling from the Second Circuit in 1979, *D.C. Comics v. Crazy Eddie*,[109] in which the court, "simply concluded that the television commercial could not qualify as fair use parody because it was nothing more than an unjustifiable appropriation of copyrighted material for personal profit."[110] Primarily commercial ventures, the court ruled, simply do not qualify as fair use.

As for the basic claim of trademark infringement, Judge Haight did not even invoke the Lanham Act's seven-point test for consumer confusion in reaching his conclusion. Rather, he founded his trademark ruling on many of the arguments discussed above, stating, "for essentially the same reasons stated in connection with the plaintiff's copyright claims, I decline to recognize defendants' commercial as parody. Accordingly, that defense fails again."[111] Haight also mentioned the fact that the Fat Boys were only "parodied" after they declined to appear in the commercial themselves, thus lending strength to the argument that the plaintiffs must have been aware of the potential for confusion, and indeed, probably hoped to capitalize upon it.[112]

Meanwhile, as the Second Circuit was developing its emphasis on the first plank of the test, Alben traced the evolution of another approach which emphasizes the fourth plank (effect on the potential market value of the original work). Alben cites the *Eveready* case as exemplary of this second trend.[113] In 1991, the Eveready Battery Company lost a claim of copyright and trademark violation in the Eighth Circuit against the Adolph Coors Company over a television commercial for a Coors product which parodied the style and structure of a series of commercials for an Eveready product. Dressed in floppy bunny ears and carrying a bass drum, actor Leslie Nielsen walked onscreen in the middle of a beer commercial in very much the same way that the trademark Energizer bunny had been used to interrupt fake commercials for other products.

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[108] *Tin Pan Apple, Inc.* 2276.
[109] *D.C. Comics v. Crazy Eddie*, 205 USPQ 177 (S.D.N.Y. 1979), *cited in* Ibid.
[110] *Tin Pan Apple, Inc.*, 2278.
[111] Ibid., 2279.
[112] Ibid., 2280.
[113] Alben, 555.

Writing for the court, Judge Norgle specifically rejected the Second Circuit's emphasis on the first plank of the test, and Judge Haight's use of the phrase "solely for personal profit," in particular. A television commercial, Norgle argued, cannot be accurately described as having no other purpose than creating personal profit, and, "it is also difficult for this court to conclude that the Coors commercial is 'unrelieved by any creative purpose (as Haight had described the *Tin Pan Apple* case)."[114]

The fourth plank, not the first plank, according to Norgle, "has been described as 'undoubtedly the single most important element of fair use.'"[115] Moreover, the fourth plank does not refer to the effect of criticism upon the market value of a work -- if a bad review or biting imitation of a work reduces people's interest in seeing the original, this does not weigh against a finding of fair use. The only factor to be considered for the fourth plank, according to Norgle, is whether the parody can be shown to have the effect of "usurping or replacing the demand for the original." Basing its judgment mainly on this factor, the *Eveready* court characterized the Coors commercial as fair use because "viewers will not stop watching the Eveready commercials in order to watch the Coors commercial on another channel."[116]

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[114] *Eveready Battery Co., Inc. v. Adolph Coors Co., Coors Brewing Co.,* 765 F. Supp. 446 (N.D. Ill. 1991).

[115] *Harper & Row, Publishers, Inc. v. Nation Enterprises,* 471 U.S. 539, 566, 105 S.Ct. 2218, 2230, 85 L.Ed.2d 588 (1985) quoted in Ibid., 448.

[116] *Eveready* 448.

In support of this decision, Norgle cites several other trademark cases, most notably *Elsmere* (the Saturday Night Live parody of "I Love New York"), and *Pillsbury* (with its erotic depiction of the dough boy).[117] The fourth plank plays a key role in both of these cases, in a way that is similar to the *Eveready* decision. *Elsmere* essentially ignored the first two planks of the test, and argued that the third plank (amount taken from the original work) offers parody a special privilege of substantial use. However, *Elsmere* also picked up on the portion of the *Berlin* ruling which argued that parody, as a new, different and original work, cannot fulfill demand for the original, and, in the end, the *Elsmere* court agreed.[118]

The *Pillsbury* court chose to systematically consider all four factors of the Fair Use test, starting with the fourth, which the court described as "often determinative," because it has "traditionally" received the heaviest emphasis.[119] And, as in the *Eveready* case, the core of the *Pillsbury* court's ruling against copyright infringement centered on the fact that the plaintiff was unable to show any significant fourth plank evidence that the value of, or market for, the original had been measurably affected by the parody.

The issues and approaches undertaken as part of the Fair Use debate among the circuits are likely to foreshadow some future battles awaiting parodies in the area of trademark dilution. Many of the strategies which were seen to succeed or fail offer lessons for those who will engage in future litigation. Perhaps the most valuable lesson to be found in all these cases, however, is the potential for serious disagreement among federal courts. Such widely divergent interpretations offer little comfort to either parodists or trademark owners in the long term. It is a central purpose of the Supreme Court to provides some direction in such disputes, however, and that is exactly what occurred in 1994.

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[117] *Elsmere Music v. NBC*, 5 Med.L.Rptr. 2455, and *Pillsbury v. Milky Way Productions*, 8 Med.L.Rptr. 1016.
[118] *Elsmere* 2458.

In 1989, one of the members of the rap group 2 Live Crew composed a parody (with the same title as the original) of the well-known song, "Oh Pretty Woman," written by Roy Orbison and William Dees. The band's manager contacted the company to whom Orbison and Dees had assigned the rights of their song, informing him of the parody, and offering to pay a license fee. When the company, Acuff-Rose Music, refused permission to parody the song, 2 Live Crew proceeded nevertheless, releasing records, cassette tapes, and compact discs of "Pretty Woman" in a collection of songs. Orbison and Dees are identified as the authors of "Pretty Woman" on the packaging of 2 Live Crew's albums and compact discs, and Acuff-Rose is listed as the publisher of the song. The court notes, "almost a year after the parody's release, at which point a quarter of a million copies of the recording had been sold, Acuff-Rose sued 2 Live Crew and its record company, Luke Skyywalker Records, for copyright infringement." [120]

2 Live Crew was granted summary judgment at the district court level on the basis that their version was a parody, which took no more than necessary to "conjure up" the original (plank 3), and was "extremely unlikely" to adversely affect the market for the Orbison and Dees version (plank 4). This decision was overturned by the Sixth Circuit Court of Appeals, which focused its judgment on the commercial nature of rap parody version (plank 1). Citing a 1984 case about the potential infringement of motion picture copyrights by the manufacture of VCR machines,[121] the Sixth Circuit ruled that, "every commercial use...is presumptively...unfair." This progression of rulings very much epitomizes the dispute among the courts described above.

The Supreme Court, however, overturned the Sixth Circuit ruling in 1994 by correcting what it ruled to be the Sixth Circuit's overemphasis on the commercial nature of the rap song parody. Using the word "transformative" to describe derivative works which alter the original with their

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[119] Ibid.

[120] *Campbell v. Acuff-Rose Music*, 114 S. Ct. 1164 (1994).

own commentary, the Supreme Court considered the amount of "new" expression against the profit-making potential. "The more transformative the new work," wrote the court, "the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use." This factor essentially won the case for Campbell, *et al.* The Supreme Court's ruling shifted the balance of factors within the Fair Use test away from the Sixth Circuit's emphasis on the first factor (the intended purpose of the disputed work.).[122]

However, the high court's ruling also did not fully espouse the Eighth and Ninth Circuits' emphasis on the fourth plank. Instead, the court rejected the use of any one of the Fair Use planks as a threshold question before the others. "The threshold question when fair use is raised in defense of parody is whether a parodic character may reasonably be perceived," wrote Justice Souter for the unanimous court. If a derivative work transforms its subject into a recognizable parody, then both the first and fourth factors weigh less heavily against a finding of fair use, according to *Acuff-Rose*.

Justice Souter also mitigated the importance of the fourth plank by noting (as did *Eveready*) that "when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act...[b]ecause 'parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically.'"[123] In the end, the fourth plank of the *Acuff-Rose* case was remanded to the lower courts because 2 Live Crew had failed to show evidence of the potential effect of their song on the copyright holder's legitimate right to authorize a non-parody, rap version of the song in the future. As a derivative parody, then, the Supreme Court ruled that 2 Live Crew's version met the fourth plank of the fair use test ("since

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[121] *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984).

[122] Campbell v. Acuff-Rose Music, 114 S. Ct. 1164 (1994).

[123] Ibid., containing quotation cited only as, B. Kaplan, An Unhurried View of Copyright 69 (1967).

the two works usually serve different market functions,"[124]), although it might still be an infringement as an unauthorized rap version of the song.

With regard to the third factor (amount and relative importance of the portion copied), the court echoed the widely accepted notion of special privilege for parody which goes back to *Berlin*, affirming that its, "art lies in the tension between a known original and its parodic twin...the heart is what most readily conjures up the song for parody, and it is the heart at which parody takes aim." However, copyright scholar Melville Nimmer notes that the high court's ruling on this factor remains "mired in paradox,"[125] perhaps because it uses a subjective interpretation of how well a parody transforms its subject to determine whether a particular instance of parody is valid.

Thus, for all its flowery praise of the "art" of parody, *Acuff-Rose* still places the burden of proving fair use on, "the parodist's justification for the particular copying done." And to underscore the fact that he does not mean to let anyone off the hook, Souter specifically warns that, "this is not, of course, to say that anyone who calls himself a parodist can skim the cream and get away scot free," which leads back to the old, unresolved questions of exactly what parody is, and who will be the judge. The best guidance that *Acuff-Rose* has to offer is that parody transforms its subject, and a reasonable recognition of a work as parody provides a threshold for application of the Fair Use Doctrine. Beyond that, Souter acknowledges that a case-by-case approach represents the only reliable approach, as, "the task is not to be simplified with bright line rules."[126]

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[124] Ibid.
[125] Nimmer, 150.
[126] *Acuff-Rose, 1164.*

Conclusions:

The role played by parodists in our society is vital but fragile. This may be said of all forms of art, journalism and creative expression, however, parody is special for at least two reasons. First, works of parody employ many layers of often contradictory meanings, rich with overtones, intertextual references, and innuendo. Second, historically, parodists have tended to draw the ire of the wealthiest and most powerful members of society -- even more than other forms of art and criticism -- thus subjecting them to greater danger of censorship and repression in general.

American law does, in fact, allow special protection for parody. The copyright tradition has carved out a reliable and effective approach to the slippery concept of this ancient art form by protecting it under the terms of the Fair Use Doctrine. The recent ruling by the Supreme Court in *Campbell* sends a clear signal that cultural texts and images should be available for use in comment or criticism, so long as the extent and intent of that use is judged to be fair. One of the most important aspects of *Campbell* is the clarity and emphasis with which it recognizes the value of parody – in language that goes beyond questions of copyright or trademark. In the same spirit, the word "fair" has been included in the exemptions section of the FTDA. This is an example of American law being used for its highest purpose: to safeguard the lone dissenting voice even in the face of powerful opposition. The Fair Use Doctrine offers an excellent model for trademark cases in the context of parody because at its core, it protects the concept of free expression which naturally belongs in a system of free trade and democracy.

Unfortunately, as the uneven history of parody's protection in both the trademark and copyright traditions illustrates, the fate of parody may change with the composition of the judiciary. Despite the fact that many dedicated artists have been willing to risk their lives to mock the mighty, chilling effects do exist, and with good reason, as the conversation among the cartoonists included in the "Recent Social and Political Context" section of this paper demonstrates. Political, social, and economic pressures may affect the courts' interpretations as well. The long tradition of battles over the rights of parodists continues today in the area of trademark dilution, and it will face new challenges in the future. Fortunately, the world suffers no shortage of people willing to poke a little fun, nor of subjects from which to choose.

Nevertheless, a deeper problem does exist here, and it was explored very thoughtfully by Jane Gaines in her book on television and film law titled Contested Culture. In reviewing this book, Diane Waldman uses the term "commodification" to describe the process[127] by which some important cultural texts and symbols come to be seen as objects which are subject to sale and ownership in the legal discourse of intellectual property. Any law which allows someone to "own" popular phrases or images carrying great power and meaning has a dramatic effect on the nature of expression and dialogue in society. This is especially true today, when social dialogue takes place through so many new forms of media in which the commodification of words, symbols, and ideas has been institutionalized as a bonding of economic, cultural, and political forces referred to as the Information Age. The danger is that many of the rich and subtle ways in which culture affects our lives will be inhibited through this process. As Gaines herself puts it, "legal discourse is designed to guard against ambiguity, and even the use of synonyms is avoided because it produces unwanted ambiguity rather than clarity. Meaning is bound again and again to linguistic terms through the ritual of citation."[128] Parody's stock-in-trade is, of course, layered and often contradictory meanings which revel in correspondences and ambiguities. And the long term effects of binding parody to a legal framework, even one as accommodating as the Fair Use Doctrine, remain to be seen.

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[127] Waldman, 78.

[128] Jane Gaines, Contested Culture: The Image, the Voice, and the Law (Chapel Hill and London: University of North Carolina Press, 1991) p. 2.

Humor, and specifically parody, continues to play a significant role in the world today. Parodists in the modern United States are very lucky by the standards of just about any other nation or civilization in the past of present. Not all those who have engaged in wit or ridicule directed against the powerful have fared so well. This reality has given rise to jokes of its own, such as, "is it true that Comrade Stalin collects political jokes? Yes, but first he collects the people who tell them."[129]

Even so, this is a time when many corporations have become more powerful than nations. Some people fear what may be the twilight of the nation-state as the dominant political and social form in the world, while others see it as nothing more than a reshuffling of power and money relationships which existed long before nation-states were understood in the modern sense. It would be difficult to argue against the fact that corporations operate more like nations now than ever before, often without effective governmental regulation.

In this atmosphere, public figures such as Ted Turner. Rupert Murdock and even Ross Perot have used their wealth and power as a new breed of businessmen-turned-politicians. Meanwhile, with the grassroots nature of the Internet and other forms of communication, parodists and other commentators will be to provide a kind of foil, or checking value, against this new kind of aristocracy. At its heart, parody has always provided a deep and yet stinging form of ideological check in this same way. Even today, even when thoughts and images are commodified into intellectual property, that checking value may turn out to have more political significance than it ever did before.

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[129] Gregor Benton, "The Origins of the Political Joke," Humour in Society: Resistance and Control (New York: St. Martin's Press, 1988) p. 37.

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The Supreme Court and its "Public":
The Maturation of Theory and Interpretation

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The Supreme Court and its "Public":

The Maturation of Theory and Interpretation

Much traditional legal scholarship is devoted to attempts to establish definitive meanings for imprecise terms or phrases in the law.[1] Such study has led to authoritative declarations that a particular law or phrase means several contradictory things and has prompted harsh criticism of Congress, administrative agencies, and the courts for failure to provide clear, consistent standards. For example, numerous scholars have scrutinized the scope of authority given the FCC through the congressional mandate that it operate in "the public interest, convenience and necessity."[2] Such careful scrutiny has led to suggestions that this vague mandate inappropriately confers "all the power that our government, which presumably acts only in the public interest, can have."[3] Others examining the same issue have concluded that this clause in the Communications Act of 1934 instead conveyed to the FCC only the limited power to address the problem of reducing airwave interference in the public interest.[4] A third group found the legislative mandate "vague to the point of vacuousness, providing neither guidance nor constraint on the agency's action."[5] Attempts to define the concept of broadcasters as "public trustees" engenders similar disagreement.[6] And similar differences of opinion appear when scholars attempt to determine which topics constitute "matters of public concern" within libel litigation.[7]

To varying degrees, traditional legal scholars base their examination, and eventual criticism, of the law on two questionable assumptions: 1) that the law does – and should – have a clear, consistent meaning, and 2) that this meaning should be clear from the outset. In other words, these scholars criticize the law as erratic precisely because they believe it is the job of administrative agencies and courts to perceive the one real meaning of the phrase "in the public interest" and to base their decisions consistently upon this meaning.

In recent years, a separate school of legal scholarship has characterized these traditional studies as futile attempts to reify language that is intentionally and necessarily imprecise and flexible. Critical legal scholars invoke the indeterminacy of language to "unmask[] the law's veneer of objectivity" and to criticize its inherent subjectivity and contextuality.[8] Rather than attempt to unearth the objective meaning hidden within legal texts, these scholars see the legal process as the process which creates meaning in laws and legal terminology. Thus, Fiss has said, "Adjudication is the social process by which judges give meaning to our public values."(emphasis added)[9] Many critical scholars see the indeterminacy of legal language as an innate property of both language and law and argue that this constitutes an irremediable flaw in the judicial system.[10]

Thus, despite their different point of departure, many critical legal scholars reach conclusions similar to their traditional counterparts. They condemn the fluidity they find in the law as contrary to the need for stable, predictable standards. They critique the administrative agencies and courts for activism, for being erratic, superficial, or sloppy, or they suggest that the process has been captured by the powerful.

Both groups of scholars tend to examine a specific legal product – a statute, administrative rule, or legal decision – as the mature fruit of the legal process. Studies which scrutinize the use of one phrase in one context or the use of one phrase through time by one body provide a wealth of data on the unique difficulties and procedures of different players in one locus of the policy process but often fail to give adequate weight to the complex interactions among the branches of government.[11]

Although some scholars have identified a cycle of latency, adolescence, and maturity within the internal process of administrative agency rule making,[12] this researcher could find no studies applying the policy cycle concept to the Supreme Court or to the multi-branch process of adoption and interpretation of key legal phrases.[13] Indeed, Krasnow, Longley and Terry decry the fact that "so little effort has been devoted to the systematic understanding of broad-scale regulatory systems."[14] Yet there is every reason to suspect that the complex decisions among and across the branches of government that give meaning to key legal phrases develop in a cycle from ambiguity through crystallization to maturity.[15]

To determine the relevance of the policy cycle concept to the macro level of policy making, this research views Congress, the FCC, and the Supreme Court as components of one communications policy process. Using key statutes, FCC rulings, and Supreme Court decisions, this research evaluates whether shifting uses of the term public as applied primarily to electronic media may be seen to represent and reflect maturation of the concept of public both within communication policy and within social science.

To frame this discussion, Part II of this paper reviews the policy cycle literature and then presents a summary of public opinion theory and legal theories of public from a policy cycle perspective. Part III applies the policy cycle stages to an array of Supreme Court decisions giving meaning to the term public. In Part IV, the author discusses the findings and suggests that Supreme Court rulings applying and defining public are neither simplistic nor erratic but rather employ the term public in ways that parallel contemporaneous theories on public opinion.

II. Cycles of Policy and of Communications and Legal Theory

A. Policy Cycles

Cycles of regulation and laissez faire, intervention and retrenchment have been duly noted in American politics and a wide array of domestic policy arenas.[16] Such policy cycles arise from and reflect the impermanence of funding, fading memory, shifting attention, and the impact of transient interest groups that differentially generate and perpetuate issues, solutions, and support.[17] Many scholars conceptualize a policy cycle comprised of four functional stages roughly comparable to human development: infancy/latency, adolescence, maturity, old age/obsolescence.[18] Schlesinger has suggested that policy cycles, like political cycles, occupy approximately 30 years.[19]

While basic policy cycle studies have highlighted the growth and evolution of public policy, they also tend to segregate policy functions artificially and to reinforce a simplistic notion of policy making that masks or ignores the complex and subtle choices and effects of various participants in the process.[20] For example, two textbooks employing the policy cycles model represent administrators as virtually unfettered actors who determine and implement the details of legislation based primarily on their own vision and discretion.[21] Yet these texts also present the administrators as largely responsive or advisory to the agendas and policy options presented by the media, interest groups, effected industries, or political parties. Thus, the power of administrators is circumscribed to the implementation stage.

Empirical studies however suggest that the function of policy participants is both broader and more complex. For example, administrators acquire power through longevity and may exert pressure on Congress. Recent studies also demonstrate active cooperation between administrators and judges to develop new programs and policies.[22] Such studies do not eliminate the policy cycle, however. Rather, "[i]n the contemporary view of the policy process, political and administrative officials share participation across the four public policy functions."[23]

B. Prior to 1935 – Cycle One: Infancy of Communications and Legal Theories

The shifts and developments in communications and legal theories of publics throughout this century may be interpreted within this policy cycles perspective. Thus, communications and legal theories of public can be divided into three 30-year cycles (with each perhaps incorporating its own cycle of maturation), with the second beginning in the mid-'30s to coincide with passage of the Communications Act of 1934. The first cycle of communications theory represents the infancy of public opinion theory. Although the concept of public matures during this phase, it is clear that research is largely exploratory and tentative.

Early in the 20th century, communications researchers conceptualized a public as unstable.[24] A public was the product of transient sociological influences, an ever-changing loosely formed collective of a significant number of people that existed only through attention to and discussion of key issues.[25] The public was seen as something of a mass or crowd phenomenon that was more than the sum of its parts. A public then was the unique product of communal influences that produced unique values, needs, and priorities.[26]

However, as theory developed, scholars suggested that a public was neither monolithic nor uniform. Thus, it was appropriate for Park to distinguish the concepts of crowd and public.[27] Although both represented a collective will in the process of establishing a social norm or group, a crowd was identifiable by its emotional unanimity while a public defined itself through oppositional discourse about an issue. A public required focused, interactive collective behavior. Lippmann later suggested that all members of the public need not actively participate in deliberation. Rather, he dichotomized the public into participant interest groups and more detached observers.[28]

The infancy cycle of American legal theory reaches back to the very origins of American constitutional law. Embedded in the Constitution lies a compromise between two intertwining theoretical strands: classic liberalism (anti-federalism) and federalism. The classic liberal view that government and its policies are the product of collective individual preferences represents a negative liberty perspective that seeks to protect individual freedom of private contract from governmental action. For liberals, government regulation is justifiable primarily to address the ability of monopolies to squelch the freedom of other individuals to engage in competitive commerce and to limit the ability of current actions to encumber the freedom of future generations (e.g., public debt).

Classic liberalism counterpoises the individual and society and argues that any distinct notion of public interest (i.e. any definition of public interest that is not equivalent to the sum of individual interests) violates individual freedom. In contrast, federalists believe the government has a positive obligation to promote and protect the public good, which differs from the aggregate of individual preferences. Federalists believe government's primary role is to assert the organic, communal public that cannot be expected to arise from the struggle of competing narrow, personal perspectives.[29] Federalists view individualism as antithetical to communal public good.[30]

The ambiguous legal concept of regulating broadcast media in the public interest embraces this fundamental friction. The public interest concept set forth in the Radio Act of 1927[31] is attributed to Secretary of Commerce Herbert Hoover. The dominant history suggests that, in response to rapidly growing demand for and chaotic interference on the radio spectrum, Hoover was attempting to protect both public (aggregate audience) interest in access to programming and private interests in uninterrupted use of a broadcast channel. Hoover thus was responding both to private and public pressure when he told the Fourth National Radio Conference in 1925 that "[t]he use of a radio channel is justified only if there is public benefit."[32]

Upon passage of the Radio Act of 1927, one commentator suggested an inherent conflict between public and private interests. In this view, the public interest standard in the law established that "licenses are no longer for the asking. The applicant must pass the test of public interest. His wish is not the deciding factor."[33] In 1929, the Federal Radio Commission also interpreted the public interest standard as contrary to private interests. The FRC said, "Broadcasting stations are licensed to serve the public and not for the purpose of furthering the private or selfish interests of individuals or groups of individuals. The standard of public interest, convenience, or necessity means nothing if it does not mean this."(emphasis added)[34] Congress did not attempt to reduce or even address this tension between liberal and federalist visions or to "clarif[y] the meaning of the public-interest standard" when it incorporated the "public interest, convenience, and necessity"[35] concept into the Communications Act of 1934.[36]

In contrast to this traditional history of the public interest standard, Hazlett suggests that the term was used to disguise Congress' desire to regulate a new and powerful medium that could threaten existing political interests.[37] He argues that public interest legislation is a mechanism through which legislators maximized political support, incumbent broadcasters maximized profits, and lobbyists maximized their political capital.[38] Legislators, incumbent broadcasters, and lobbyists alike recognized and appreciated the imprecision of the public interest language as a mechanism for asserting their own changing interests through time.[39]

C. 1935-1965 – Cycle Two: Adolescence of Communications and Legal Theories

While early public theorists, including Allport, argued from democratic theory that the public must include every individual within a defined geographic area,[40] the second cycle of public opinion theory was marked by a narrower, more-participatory view of the term. Blumer advanced the vision of the public as both responsive and divided. For Blumer, "[t]he term public is used to refer to a group of people (a) who are confronted by an issue, (b) who are divided in their ideas as to how to meet the issue, and (c) who engage in discussion over the issue."[41] Clearly, a public was not static. Foote and Hart outlined a five-step process, similar to the policy cycle, through which publics developed.[42] A unique public thus developed through disagreement and debate over a particular issue, and the composition and involvement of publics changed throughout the process.

While scholars struggled to identify any unique processes or traits of publics, the FCC wrestled with the meaning of the public interest standard the Communications Act advanced. Because the act did not define public interest, the commission attempted to determine the appropriate application of the public interest standard through reference to the act's broad principles or overall purpose.[43] The law mandated that the Commission establish "such rules and regulations as may be necessary in the public interest."[44] The first section of the Communications Act established the law's general purposes to include "mak[ing] available, so far as possible, to all the people of the United States, a rapid, efficient, Nation-wide, and world-wire wire and radio communication service."[45]

With regard to use of radio spectrum, the law established its primary purposes as maintaining control of and efficient use of the radio spectrum.[46] The section of the act setting forth the public interest standard, the statute ordered the FCC "to prevent interference between stations ... [and to] generally encourage the larger and more effective use of radio in the public interest."[47] The law did not prioritize these purposes, which clearly might conflict, but throughout this period the FCC employed the public interest standard to justify government intervention in the broadcast market and rules that dichotomized public and private interests.[48]

The Commission refused to establish a "rigid mold or fixed formula" for the public interest and held that the public interest required broadcasters to actively poll the interests of their audience.[49] Thus, the public interest required broadcasters to make "a diligent, positive and continuing effort ... to discover and fulfill the tastes, needs and desires of his community or area [of] broadcast service."[50]. In the same programming report, however, the Commission flatly rejected statistical analysis as the full measure of the public interest. Rather, vocal, active listeners could assert their interests as representative or significant during this period when broadcasters were encouraged to understand the unique interests of their listeners as a guide to service in the public interest.

D. Post-1965 – Cycle Three: Maturity of Communications and Legal Theories

In the 1960s, a majoritarian view of public dominated communications theory as researchers relied increasingly on public opinion polling.[51] From this perspective, public was a statistical construct rather than a discrete entity with unique traits. The public was merely the sum of the observed individuals with no independent values or interests. Building on this vision, researchers, including Key, suggested a contextual, elitist definition of the public.[52] The public was a changing response to a series of specific conditions which tended to be roughly equivalent to active voters, participants rather than observers, and attentive, engaged citizens. Thus, Price turned early theory on its head and argued that the unanimity and inclusiveness of a crowd was a "counterconcept against which the public is defined."[53]

Critical legal scholars similarly decried any monolithic or static definition of public. They rejected mutually exclusive definitions of public/private and asserted that "the public interest ... necessarily involves private interest, and vice versa."[54] Both terms had meaning only in a specific context and as "a reification of concrete circumstances."[55] Accordingly, public and private constituted each other and could not exist without their complement.

Naturally, then, many critical theorists condemned what they perceived as the dominance of classic liberalism in America. Arguing that liberal dominance created an American society "swayed far more easily by images of individualism and autonomy than by visions of unity," Ingber said "the fabric of relatedness seems dangerously threadbare and frayed ... [and] retrieval of common values increasingly difficult."[56] Critical theorists also argued that liberal dominance of policy impoverished policy choices because of the deeply imbedded and widespread belief that communal public values could be asserted only through an unacceptable loss of individual rights. But "the apparently noble task of protecting the freedoms of individuals against group constraints ... makes sense only if freedom, constraint, individuals, and groups are manifestly distinct categories. And manifestly, they are not."[57] Indeed, decades of research across disciplines has failed to draw a clear or consistent line between public and private.[58]

Throughout this period, Congress increasingly protected the public interest by addressing the concept contextually rather than globally. Thus, there were multiple public interests which could be parsed and independently advanced and protected. Within a given context, however, active engagement (e.g. lobbying or visibility) and power (e.g. advancing majoritarian principles or interests) shaped the public interest. For example, Congress imposed several specific obligations on broadcasters to advance their own public interest in incumbent access to media (i.e., open discourse) within public elections.[59] Separate legislation addressed the public service responsibilities of the cable industry to serve viewers ill-supported by broadcast television. Congress addressed "the educational and informational needs of children" by including service requirements in the television license review process established in The Children's Television Act of 1990.[60] Additional public interest in protecting children from "sexual, violent, or other indecent material" led Congress in The Telecommunications Act of 1996 to require television manufacturers to equip sets with v-chips to enable parents to " be informed before [such material] is displayed to children."[61]

Throughout the early years of this epoch, a sometimes fractious and divided FCC grappled with the application of the public interest standard to expanding communications technologies (e.g., cable television and satellite communications) and with what standards, if any, should guide determinations of performance in the public interest at time of broadcast license renewal.[62] The Commission favored a narrow, case-specific contextual approach to the public interest[63] and suggested a conflict inherent in the public interest, "namely, the maintenance of the competitive spur and the preservation of predictability and stability of broadcast operation[s]."[64]

As technologies developed and the FCC gained experience and expertise relevant to cable and satellite communications, the Commission shifted its public interest analysis toward the broader "context of a comprehensive long-range plan."[65] The FCC established "capacity, reliability, and cost [as] ... primary factors" in determining the public interest[66] but continued to view the public interest as inherently opposed to the freedom of individual broadcasters.[67] Yet despite this explicit orientation contrary to the self-interest of broadcasters, the FCC rejected a claim that the public interest mandate of the Communications Act required broadcasters to make time available to congressional groups wishing to address the public.[68]

Elsewhere, in proceedings dealing with multiple ownership, the FCC also rejected an attempt to equate popularity with the public interest.[69] Indeed, in 1975 the FCC rejected broadcaster-citizen agreements concerning programming as a thinly veiled "attempt to hold the licensee accountable to essentially private interests."[70] The Commission held that

> [t]he licensee is obligated to reserve to himself the final decision as to what programs will best serve the public interest. ... [A] licensee is not fulfilling his obligations to operate in the public interest, and is not operating in accordance with the express requirements of the Communications Act, if he agrees to accept programs on any basis other than his own reasonable decision that the programs are satisfactory.[71]

By the end of the 1970s, changes in the radio and media markets led the FCC to move to deregulate radio content on the basis that "the public interest is best served by reducing our involvement in programming decisions in broadcast radio and substituting the public will through the workings of marketplace forces."[72] Thus, the FCC found "consumer well-being – ... the major yardstick" of the public interest – required "the market to dictate the programming decisions while the Commission regulates the structural aspects" of broadcasting.[73] Throughout the '80s, the FCC moved toward deregulation, competition, and a statistical, money-talks mechanism of determining the public interest. The FCC increasingly equated the public interest with "the maximization of customer choice, ... the hallmark of a competitive market."[74] Despite assertions that state regulation might best address unique, local, communitarian public interests, the FCC also preempted state authority that might interfere with the competitive interests of broadcasters.[75] By the 1990s, the Commission increasingly equated the public interest with the business interests of communications providers.[76]

During this same period, the FCC moved toward a more complex view of public interests in which private and public interests could conflict, complement, or intermingle.[77] Indeed, during the past three decades, the FCC has grappled more and more with issues in which public and private communications networks were interconnected.[78] Yet, despite the increasing difficulty of parsing private from public, and despite the increasing sophistication of FCC analysis, scholars – including this author – have repeatedly criticized the FCC for failure to establish a consistent, workable approach to the public interest mandate. Similar criticism of the Supreme Court may rest upon failure of scholars to interpret court rulings within the complex frame of evolving theory and policy cycles.

III. Public Interests, Policy Cycles, and the Supreme Court

Clearly the Court began to establish its view of the public interest before the adoption of the Communications Act of 1934 that applied the standard to broadcasters. In 1876, *in Munn v. Illinois*,[79] the Court upheld the authority of the legislature to regulate any firm affected with the public interest. This early decision, holding that corporations could be regulated when their activities had a substantial relation to public health, morals or safety, embodied the Court's original federalist concept of public versus private. The Court struggled to infuse the term with clear meaning. In 1933, the Court said the definition of the public interest depends on the context.[80] However, in 1934, the Court said that "the expressions 'affected with a public interest,' and 'clothed with a public use,' ... are not susceptible of definition and form an unsatisfactory test."[81] An apparently confused Court's relied on tautologies to evoke a seemingly clear, shared understanding of the meaning of public interest.[82]

In one of its earliest rulings applying the public interest mandate to broadcasting, the Court *in FCC v. Pottsville Broadcasting Co.* in 1940 framed Congress's intent as constraint of monopoly power.[83] The Court also established the public interest as a comparative, rather than an absolute, standard and held that the public interest standard was "as concrete as the complicated factors for judgment in such a field of delegated authority permit."[84] The Court called the public interest standard a "supple instrument" by which the government could "maintain ... a grip" on the development of radio.[85]

Throughout this adolescent period of communications theory, an oppositional – public versus private – view dominated the Court's communications rulings. In 1943, the Supreme Court upheld the public interest standard against a challenge that it was unconstitutionally vague.[86] The *National Broadcasting Co.* ruling established that the public interest to be served by broadcasters is "the interest of the listening public in 'the larger and more effective use of radio.'"[87] The Court also found that the public interest embodies the responsibility of broadcasters to provide "the best practibable service to the community reached by his broadcasts."[88]

But the Court tied its early rulings, and its definition of the public interest, to the transience of communications technologies. The Court said that a broad and fluid interpretation of the public interest was vital to avoid "sterotyp[ing] the powers of the [Federal Communications] Commission to specific details in regulating a field of enterprise, the dominant characteristic of which was the rapid pace of its unfolding."[89] As communications systems proliferated and public interest theory evolved, the Supreme Court established the public interest standard as "a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative purpose."[90]

Justice Frankfurter went so far in delegating the determination of public interest to the Commission that he asserted, in dissent, that the actions of the FCC could be "assume[ed]" to protect the public interest.[91] The Court, as a whole, did not agree. In 1953 the Court refused to accept the FCC's decision that encouragement of competition alone advanced the "vaguish, penumbral bounds" of the public interest.[92]

As the Court entered the mature stage of policy development, it simultaneously deferred to and limited the power of the FCC. For example, in 1969, in *Red Lion Broadcasting v. FCC*, the Court upheld the FCC's position that the public interest "clearly encompasses the presentation of vigorous debate of controversial issues of importance and concern to the public" because it is the interests of the listening public, not of broadcasters, that are paramount.[93] But the *Red Lion* Court also said the Commission was not free to institute an idiosyncratic conception of the public interest.[94] By the early '70s, the Court examined the public interest role of cable television and deferred to FCC judgment that program origination advanced the public interest by "encourag[ing] the larger and more effective use of radio in the public interest."[95] But in dissent, Justice Douglas argued that the Court twisted the public service into an unsanctioned "power to compel people to become broadcasters."[96] Then, while upholding the Fairness Doctrine in 1973, the Court conceived of the public interest as a "delicate balancing of [the] competing interests" of the government, in its role as "ultimate arbiter and guardian of the public interest," and the freedom of the licensee.[97] At the same time, the *Columbia Broadcasting System* Court reiterated its concern that the public interest not be "subordinate to private whim."[98]

During this period, the Court reaffirmed its position that the meaning of "public interest" is derived both "from the purposes of the regulatory legislation" that establishes the interest and from consideration "of the policies reflected in other relevant statutes."[99] Thus, sometimes the Court defined public to be narrowly circumscribed by the intent of specific legislation or precedent. For example, in 1989 in *Department of Justice v. Reporters Committee for Freedom of the Press*, the Court limited the "public interest in disclosure" to coincide with the "core purpose" of the challenged statute, the federal Freedom of Information Act.[100] And in 1996 in *Denver Area Educational Telecommunications Consortium v. FCC*, the Supreme Court said public access channels are public forums "that the State has opened for expressive activity by part or all of the public."[101]

At other times, the Court interpreted the public interest with reference to traditional usage. In this more liberal interpretation, the traditional rights of individuals limit the ability of government to regulate. Thus, the Court relied upon differences in their tradition of openness to uphold public access rights to trial courts but not to penal institutions.[102] And in *Pacific Gas & Elec. Co. V. PUC of California,*[103] the plurality distinguished the private nature of the company's billing envelopes from the courtyard of a shopping center which was, "almost by definition, peculiarly public in nature."[104]

The murkiness of definition by tradition revealed itself in cases dealing specifically with appropriate regulation of public forums. Here the Court, faced with mixed uses and competing public interests, had great difficulty articulating the essential characteristics of a public forum, the permissible degree of government constraint, or the propriety of regulation to distinguish the messages of individual speakers in a public forum from government speech. In 1992, a frustrated Justice Stevens wrote, "The quest for doctrinal certainty through the definition of categories and subcategories is, in my opinion, destined to fail."[105] Yet these cases suggest that the Court increasingly confronted the complex interconnection of individual and communal, private and government interests.

Many Court applications of the public interest standard during this era rest upon a complicated evaluation of the contribution of the challenged activity to the democratic process or to the enlightened participation of citizens in public debate. This core First Amendment value commingles both the public and the private interest by asserting a private interest in public policy and a public interest in enlightened individuals.[106] Reliance on this multi-faceted value led to many split decisions by the Court. For example, In 1971 in *Rosenbloom v. Metromedia*, the dissent questioned whether First Amendment concerns are better protected by policy that distinguishes between public and private plaintiffs or eradicates such a distinction.[107] In 1974, the dissent in *Gertz v. Welch*[108] criticized the Court's reliance on the "too insubstantial [] reed" of an "as yet [not fully defined] class of 'public figures' involved in matters of public concern."[109]

A decade later, in *Rankin v. McPherson*, the Court upheld the public interest as sufficient to protect a government employee's right to discuss death threats on the President.[110]

Thus, while portions of the Court struggled to tie public interest to some identified level of service in the public interest,[111] to "some connection to the State, no matter how attenuated,"[112] or even to speculation, judgment, prediction or deduction,[113] other members of the Court argued that such efforts consistently failed to arrive at "any reasonable definition of 'public concern.'"[114] While the Court increasingly interpreted public interests and concerns as complex phenomena interconnected with private interests, it also struggled to ground its public policy rulings on "reference to the laws and legal precedents" rather than on "general considerations of supposed public interests."[115] But an apparently exasperated Justice Scalia would question, "What legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny, when we have repeatedly upheld, in various contexts, a 'public interest' standard?"[116]

IV. Findings

Today a distinction between public and private exists in policy, regulation, and jurisprudence. Often the public and the private are envisioned as mutually exclusive terminal points on a scale of interests, as in the common conception of public versus private property.[117] At other times, public is conceptualized as the aggregate of the private, the sum of combined private desires. Or public may refer to some ill-defined communal entity, its unique ideals and objectives.

Scholars have criticized the Supreme Court for these various and varied definitions of public and for erratic or tautological application of the public interest standard. For example, when the Court defines the public interest as the express[ed] purpose of legislation under review, critics argue that the Court relinquishes its role as independent, objective assessor of the public interest. Public interest then becomes a euphemism for Congress's stated intent. Thus, because Congress represents the public, it can by definition act only in the public interest. So holds traditional democratic theory. But beyond this conceptual problem, courts also face the difficulty posed when ambiguous and conflicting legislative purposes, as evidenced in the Communications Act of 1934, provide scant interpretive assistance.

A more substantive criticism of the democratic theory of judicial review is that it robs the process of its teeth and its merit. To provide independent review, the judiciary must at times review acts with reference to some non-legislative understanding of what is proper, good, legal ... and in the public interest. However, when the Court ventures to do this – to define the public interest substantively – critics argue that the definition embodies some particular, favored aggregate of private interests. Thus, Streeter, among others, has concluded that an ideal policy process "would still fail to live up to its purported goals of impartially serving the public interest"[118] because the Court would always infuse indeterminate legal language with its own values.

What these critics fail to grasp is the ineluctably complex and transient nature of publics and of the public interest. Critics of both the Court's fixed, contextual definitions of public and of the Court's reliance on amorphous statements of purpose presume, incorrectly, that a true meaning of legal phrases can and should be found. Policy cycle, communications and legal theories challenge this view. Indeed, a review of theory and law suggests that the Court's varied and varying definitions of the public interest are each, at times and in part, appropriate and useful. The Court's apparently contradictory opinions may in fact reflect the maturation of policy and constitute an integral part of the continuing policy and theory cycles of how publics are defined.[119] If this is true, however, the next three decades may represent a senility phase during which the Court will apply entrenched, outmoded concepts of the public interest.

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[1] *See, e.g.*, Richard J. Pierce, Jr., The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence int eh Administrative State, 95 Colum. L. Rev. 749 (1995) (examining the history and importance of the debate between congressional statutory intent and judicial interpretation of statutory meaning).

[2] 47 U.S.C. @@ 301 et seq. (1997).

[3] William T. Mayton, The Illegitimacy of the Public Interest standard at the FCC, 38 Emory L.J. 715, 716 (1989) (arguing *against* this position in favor of a limited delegation of power to the FCC).

[4] Jaffee, The Illusion of the Ideal Administration, 86 Harv. L.Rev. 1183, 1192 (1954). *See also* Harry Kalven Jr., Broadcasting, Public Policy and the First Amendment, 10 J. L. & Econ. 15, 25 (1967).

[5] Glen O. Robinson, The Federal Communications Act: An Essay on Origins and Regulatory Purpose, in Max D. Paglin (ed.) A Legislative History of the Communications Act of 1934 (1989) 3, at 14.

[6] *See, e.g.*, Mark S. Fowler, The Public Interest, 56 Fla. B.J. 213 (1982) (arguing that a market approach to broadcast programming would best serve the public), *contra* Henry Geller, The FCC Under Mark Fowler: A Mixed Bag, 10 Hastings Comm. & Ent. L.J. 521 (1988) (criticizing deregulation as contrary to the public interest); and Henry Geller, Broadcasting and the Public Trustee Notion: A Failed Promise, 10 Harv. J.L. & Pub. Pol'y 87 (1987) (advocating the regulated public trustee role for broadcasters).

[7] *See, e.g.*, Robert E. Drechsel, Defining "Public Concern" in Defamation Cases Since Dun & Bradstreet v. Greenmoss Builders, 43 Fed. Com. L.J. 1 (1990) (examining court rulings as a means to define the "public concern" standard); Cynthia L. Estlund, Speech on Matters of Public Concern" The Perils of an Emerging First Amendment Category, 59 Geo. Wash. L. Rev. 1 (1990) ("hesitat[ing] to offer a definition of speech on 'public issues' or matters of public concern.").

[8] *See, e.g.*, Steven L. Winter, Indeterminacy and Incommensurability in Constitutional Law, 78 Calif. L. Rev. 1441, 1449 (1990) (providing a detailed and critical summary of constitutional theory).

[9] Owen Fiss, The Supreme Court, 1978 Term – Foreward: The Forms of Justice, 93 Harv. L. Rev. 1, 2 (1979).

[10] Estlund, Speech on Matters of Public Concern, 59 Geo. Wash. L. Rev. 1, 45 (arguing that no definition of matters of public interest adequately protects First Amendment interests or escapes the damning problems of unacceptable vagueness and subjectivity).

[11] *But see* Erwin G. Krasnow & Lawrence D. Longley, The Politics of Broadcast Regulation (2d Ed. 1978) (offering insight into the effects of Congress on FCC decision making).

[12] Forrest P. Chisman, Public Interest and FCC Policy Making, 27 J. Comm. 77 (1977); *see also* Jeremy H. Lipschultz, The Influence of the U.S. court of Appeals for the District of Columbia Circuit on Broadcast Indecency Policy, 3 Vill. Sports & Ent. L. Forum 65 (identifying the stages of the full policy cycle as formulation, enactment, and implementation); N. Foote and C.W. Hart, *Public Opinion and Collective Behavior*, in Group Relations at the Crossroads, M. Sherif & M.O. Wilson (eds.) (1953) (outlining a similar five-step process – problem identification, exploration, proposal, implementation, and appraisal – through which publics form themselves around issues).

[13] *But see generally* Jon S. Cran in John J. Havick, Communications Policy and the Political Process (1983) (relating Supreme Court cases dealing with the term "public interest" to two erasof communications policy).

[14] Erwin G. Krasnow, Lawrence D. Longley, and Herbert A. Terry, The Politics of Broadcast Regulation 133 (3d Ed. 1982).

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[15] *See, e.g.*, Judith V. May & Aaron B. Widavsky, The Policy Cycle (1978). *See* Jeremy H. Lipschultz, The Influence of the U.S. Court of Appeals for the District of Columbia Circuit on Broadcast Indeceny Policy, 3 Vill. Sports & Ent. L. Forum 65 (suggesting a rather fixed interpretive role for the court); *but see* Erwin G. Krasnow & Lawrence D. Longley, The Politics of Broadcast Regulation (2d Ed. 1978) (examining the multifaceted methods and multiple effects of Congress on FCC decision making).

[16] *See, generally*, Richard Hofstadter, The Age of Reform: From Bryan to FDR (1955) (describing the evolution of the Populist and Progressive movements). *See also* Diane Epperson, The 30-Year Cycle in American Politics, 39 Cycles 259 (1988) (correlating Klingberg's foreign policy cycle with Schlesinger's domestic policy cycle); Rodney A. Smolla, Report of the Coalition for a New America: Platform Section on Communications Policy, 1993 U. Chi. Legal. F. 149, 152 (1993) (referencing but not elaborating on the cycle of "robust free expression" and regulation); Richard Hatcher & Barry Troyna, The Policy Cycle, 9 J. Of Ed. Pol. 155 (1994); Michael Maibach, The Industrial Policy Cycel, 5 Stan. L. & Pol. Rev. 23 (1993); Anthony Brown, The Regulatory Policy Cycle and the Airline Deregulatory Movement, 66 Soc. Sci. Q. 552 (1985); Thomas Havrilesky, A public choice perspective on the cycle in monetary policy, 9 CATO J. 709 (1990).

[17] Martha Minow, Learning from Experience: The Impact of Research About Family Support Programs on Public Policy, 143 U. Pa. L. Rev. 221 (1994) (identifying the critical value of supportive constituencies for the continuation of poverty programs).

[18] *See, e.g.*, Malcolm L Goggin, Ann O'M. Bowman, James P. Lester and Laurence O'Toole, Jr., Implementation Theory and Practice (1990).

[19] Arthur M. Schlesinger, Jr., The Cycles of American History (1986).

[20] Robert Denhardt, Theories of Public Organization 133, 31 (1984) ; Erwin G. Krasnow, Lawrence D. Longley, and Herbert A. Terry, The Politics of Broadcast Regulation 133 (3d Ed. 1982) (noting the need for studies to examine the complex interactions of policy makers).

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[22] R. Shep. Melnick, The Politics of Partnership, 45 Pub. Admin. Rev. 653 (1985); Tinsley E. Yarborough, The Political World of Federal Judges as Managers, 45 Pub. Admin. Rev. 660 (1985); Rosemary O'Leary and Charles R. Wise, Public Managers, Judges, and Legislators: Redefining the New Partnership, 51 Pub. Admin. Rev. 316 (1991).

[23] James E. Skok, Policy Issue Networks and the Public Policy Cycle: A Structural-functional Framework for Public Administration, 55 Pub. Admin. Rev. 325 (1995).

[24] *See, e.g.*, C.H. Cooley, Social Organization: A Study of the Larger Mind (1909).

[25] K. Young, *Comments on the Nature of Public Opinion*, 2 Int'l J. of Opinion and Attitude Res. 385 (1948); V. Price, *On the Public Aspects of Opinion: Linking Levels of Analysis in Public Opinion Research*, 15 Comm. Res. 659 (1988).

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[27] R.E. Park, The Crowd and The Public and Other Essays 79-80 (H. Elsner Jr., ed., C. Elsner, trans.: 1972/1904).

[28] W. Lippmann, The Phantom Public (1925).

[29] Stanley Ingber, Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts, 69 Tex. L. Rev. 1, 28-30 (1990).

[30] *See, e.g.*, Laurence Tribe, American Constitutional Law @15-1, 1302 (2d ed. 1988); Aleinikoff, Constitutional Law in the Age of Balancing, 96 Yale. L.J. 943, 946 (1987); John S. Mill, On Liberty 13 (A. Castell ed. 1947) (noting that mankind gains more by "suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest.").

[31] Ch. 169, 44 Stat. 1162 (1927).

[32] U.S. Gov't Printing Office, Proceedings of the Fourth National Radio Conference, Washington, D.C., Nov. 9-11, 1925 (1926), 7.

[33] Steven Davis, The Law of Radio Communications 61 (1927) as cited in Erwin G. Krasnow, Lawrence D. Longley and Herbert A. Terry, The Politics of Broadcast Regulation 17 (3d Ed. 1982).

[34] Great Lakes Broadcasting, 3 F.R.C. Ann. Rep. 32 (1929).

[35] 47 U.S.C. @ 303. *See, e.g.*, FCC v. WNCN Listeners Guild, 450 U.S. 582, 593 (1981).

[36] Glen O. Robinson, The Federal Communications Act: An Essay on Origins and Regulatory Purpose, in Max D. Paglin (ed.) A Legislative History of the Communications Act of 1934 (1989) 3, at 14.

[37] Thomas W. Hazlett, Unscrambling the Signals, Unbundling the Law: Physical Scarcity, Rent Seeking, and the First Amendment, 97 Colum. L. Rev. 905, 912 (1997); Thomas W. Hazlett, The Rationality of U.S. Regulation of the Braodcast Spectrum, 33 J.L. & Econ. 133, 152-71 (1990).

[38] Hazlett, 97 Colum. L. Rev. @ 912.

[39] See FCC v. National Citizens Comm. for Broadcasting, 426 U.S. 775, 805 (1978) (in which the Court affirms the protection of incumbent broadcasters and upholds the FCC's stance that "preserving continuity of meritorious service furthers the public interest.").

[40] F. Allport, *Toward a Science of Public Opinion*, 1 Pub. Opinion Qt'ly 7 (1937).

[41] H. Blumer, *Collective Behavior*, in New Outlines of the Principles of Sociology 167, A.M. Lee, ed. (1946).

[42] N. Foote and C.W. Hart, *Public Opinion and Collective Behavior* in Group Relations at the Crossroads, M. Sherif & M.O. Wilson (eds.) (1953) (identifying the stages of development of a public as: 1) a problem identification phase, 2) an explorative proposal phase 3) an evaluative and consensus-building policy phase, 4) a policy adoption and implementation phase, and 5) an appraisal phase).

[43] Communications Act of 1934, 47 U.S.C. §§ 151, 214, 310(d) (1988) (establishing this requirement of communications common carriers). *See In re* Telephone Company-Cable Television Cross-Ownership Rules 3 F.C.C.R. 5849 (1988) (Further Notice of Inquiry and Notice of Proposed Rulemaking)(holding that

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greater participation of telephone companies in providing cable services pursuant to appropriate safeguards resulted in greater competition in cable television service, and therefore, in greater public interest benefits to consumers) ; *In re* Sec. 214 Applications with the FCC, e.g., 49 F.Reg. 21333 (May 21, 1984); Susan Dente Ross, The "Strange Power of Speech:" The Unprecedented But Limited Success of Telephone Company First Amendment Arguments, forthcoming in Comm. L. & Pol'y (1998) (discussing in part the evolving application of the public interest standard to telephony).

[44] 47 U.S.C.S. @ 201.

[45] Pub. L. No. 416, Title I @ 1 (1934).

[46] Pub. L. No. 416, Title III @ 301 (1934).

[47] Pub. L. No. 416, Title III @ 301(f), (g) (1934); 47 U.S.C.S. @303 (g).

[48] *See, e.g.,* Amendment of Parts 2, 21, 74 and 91 of the Commission's Rules and Regulations Relative to the Licensing of Microwave Radio Stations, First Report and Order and FNPR, 1 FCC 2d 897, 901 (1965); Applications of Missouri-Illinois Broadcasting Co. For Construction Permit and KGMO Radio-Television, for Renewal of License, Order, 1 FCC 2d 780, 782 (1965); Applications of Lompoc Valley Cable TV, Memorandum Opinion and Order, Concurrence, 1 FCC 2d 66, 70 (1965); Establishment of a Uniform Policy to be Followed in Licensing of Radio Broadcast Stations, Opinion, 42 FCC 2d 399, 409 (1951) (interpreting the Comm. Act to establish a major function of the FCC as "the preservation of competition in the radio field and the protection of the public *as against* the private interest." (emphasis added)).

[49] Report En Banc Programming Inquiry, 44 FCC 2303, 2314 (1960) (@ 2316, noting that "the licensee must find his own path with the guidance of those whom his signal is to serve").

[50] Report En Banc Programming Inquiry, 44 FCC 2303, 2316 (1960).

[51] D.W. Minar, *Public Opinion in the Perspective of Political Theory*, 23 The W. Political Qtly. 31 (1960); P.E. Converse, *Changing Conceptions of Public Opinion in the Political Process*, 51 Pub. Opinion Qtly. S12 (1987).

[52] V.O. Key Jr., Public Opinion and American Democracy 15 (1961).

[53] V. Price, Public Opinion 26 (1992).

[54] Thomas Streeter, Beyond Freedom of Speech and the Public Interest: The Relevance of Critical Legal Studies to Communications Policy, 40 J. Comm. 43, 48 (1990). *See also* Stanley Ingber, Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts, 69 Tex. L. Rev. 1 (1990) (arguing the interactivity and complementarity of social and individual values and definitions).

[55] Thomas Streeter, Beyond Freedom of Speech and the Public Interest: The Relevance of Critical Legal Studies to Communications Policy, 40 J. Comm. 43, 48, 49 (1990); see also Stanley Ingber, Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts, 69 Tex. L. Rev. 1 (1990) (arguing the interactivity and complementarity of social and individual values and definitions).

[56] Stanley Ingber, Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts, 69 Tex. L. Rev. 1, 37 (1990).

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[57] Thomas Streeter, Beyond Freedom of Speech and the Public Interest: The Relevance of Critical Legal Studies to Communications Policy, 40 J. Comm. 43, 51 (1990).

[58] E. Schattschneider, The Semisovereign People: A Realist's View of Democracy in America. (1960).

[59] *See, e.g.*, 47 U.S.C. @ 315(b)(1) (1988) (mandating the "lowest unit charge" pricing for political campaign advertising).

[60] 47 U.S.C. @ 303b(a) (1997), one of the scattered codified provisions of Pub. L. No. 101-437, 104 Stat. 996.

[61] Pub. L. No. 104-104 @ 551 (b)-(c), 110 Stat. 56, 139-42 (1996).

[62] *See, e.g.*, Cease and Desist Order to be Directed against Booth American Co., Owner and Operator of CATV Systems at N. Muskegon and Muskegon, Mich, 4 FCC 2d 509 (1966); Cease and Disist Order to be Directed against Buckeye Cablevision, 3 FCC 2d 798 (1996); In the Matter of Establishment of Domestic Communication-Satellite Facilities by Nongovernmental Entities, Report and Order, 22 FCC 2d 86 (1970);and In re Application of Lamar Life Broadcasting Co., 14 FCC 2d 431 (1968) (Cox, Johnson, dissenting) ("The Commission's former show of concern for the public interest has been replaced by all-out indifference.")

[63] *See, e.g.*, In the Matter of Establishment of Domestic Communication-Satellite Facilities by Nongovernmental Entities, Report and Order, 22 FCC 2d 86, 94 (1970) ("In short, we believe that we can best render the public interest judgments as to what system or systems are to be authorized in the context of specific proposals."); and In re Application of Taft Broadcasting Co., Memorandum Opinion and Order, 38 FCC 2d 770, 789 (1973) (noting the Commission's responsibility to establish "a balance between preservation of a free competitive broadcast system, on the one hand, and the reasonable restriction of that freedom inherent in the public interest standard" (internal citation omitted))

[64] In the Matter of Formulation of Policies Relating to the Broadcast Renewal Applicant, Stemming from the Comparative Hearing Process, Report and Order, 66 FCC 2d 419, 420 (1977).

[65] In the Matter of Policy to be Followed in Future Licensing of Facilities for Overseas Communications, Report, Order and Third Statement of Policy and Guidelines, 67 FCC 2d 358, 367 (1977).

[66] In the Matter of Policy to be Followed in Future Licensing of Facilities for Overseas Communications, Report, Order and Third Statement of Policy and Guidelines, 67 FCC 2d 358, 364 (1977).

[67] *See, e.g.*, In the Matter of Establishment of Domestic Communication-Satellite Facilities by Nongovernmental Entities, Report and Order, 22 FCC 2d 86, 94 (1970) ("In short, we believe that we can best render the public interest judgments as to what system or systems are to be authorized in the context of specific proposals."); and In re Application of Taft Broadcasting Co., Memorandum Opinion and Order, 38 FCC 2d 770, 789 (1973) (noting the Commission's responsibility to establish "a balance between preservation of a free competitive broadcast system, on the one hand, and the reasonable restriction of that freedom inherent in the public interest standard" (internal citation omitted))

[68] In the Matter of Availability of Network Programming Time to Members of Congress, Memorandum Opinion and Order, 40 FCC 2d 238 (1972) (@ 246, rejecting the notion of mandated access for specified groups as overly rigid and inflexible).

[69] In re Application of Radio Samoa, Memorandum Opinion and Order, 51 FCC 2d 533, 540 (1975) (rejecting petitioners' assertion that when "sufficient numbers of people in the community to be

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served object to the identities of the principals of an applicant, then there is a prima facie public interest issue").

[70] In the Matter of Agreements between Broadcast Licensees and the Public, Proposed Policy Statement and Notice of Proposed Rulemaking, 58 FCC 2d 1129, 1130 (1975).

[71] 58 FCC 2d 1129, 1131 (1975).

[72] In the Matter of Deregulation of Radio, Notice of Inquiry and Proposed Rulemaking, 73 FCC 2d 457, 483 (1979); In the Matter of Deregulation of Radio, Report and Order, 84 FCC 2d 968 (1981).

[73] 73 FCC 2d 457, 491, 483.

[74] 101 FCC 2d 1046, 1065

[75] *See, e.g.*, In the Matter of Preemption of State Entry Regulation in the Public Land Mobile Service, Report and Order, 59 P&F Rad Reg. 2d 1518 (1986).

[76] *See, e.g.*, In the Matter of Newschannel Petition for Public Interest Determination Relating to Exclusive Distribution, Memorandum Opinion and Order, 10 FCC Rcd 691 (1994) (finding that exclusive distribution agreements, that effectively limited access to pertinent programming, served the public interest by promoting private profits and, hence, incentives to invest and develop diverse programming); In the Matter of Sprint Corp. Petition for Declaratory Ruling Concerning the Public Interest Requirements of the Communications Act of 1934, Declaratory Ruling and Order, 11 FCC Rcd 1850 (1995) (finding that increased foreign ownership and investment in communications corporations serves the public interest so long as the foreign markets are open to U.S. investment); In the Matter of Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to the Second Processing Round of the Non-Voice, Non-Geostationary Mobile Satellite Service, Report and Order, 1997 FCC LEXIS 5636 (Oct. 8, 1997) (holding that the public interest mandates new and competitive entry and non-interference in satellite data communications services).

[77] *See, e.g.*, Reed E. Hundt, Speech to Chamber of Commerce, Washington D.C., 1997 FCC LEXIS 2878 (1997); Evaluation of the Syndication and Financial Interest Rules, Memorandum Opinion and Order, 7 FCC Rcd 345 (1991); Review of the Technical Assignment Criteria for the AM Broadcast Service, NPRM, 5 FCC Rcd 4381 (1990); ***but see*** Reed E. Hundt, Statement o Spectrum Management Policy before the Subcommittee on Telecommunications, trade, and Consumer Protection, Committee on Commerce, U.S. House of Representatives, 1997 FCC LEXIS 816 (1997); Amendment of Commission's Rules and Regulations to Adopt New Practices and Procedures for Cooperative Use and Multiple Licensing of Stations in the Private Land Mobile Radio Services, Report and Order, 89 FCC 2d 766 (1982); Application of Cowles Broadcasting for Renewal of License, Decision, 89 FCC 2d 933 (1981); Complaints against Screen Gems Stations, Memorandum Opinion and Order, 46 FCC 2d 252 (1974) ; Application of WHAS-TV for Construction Permit, Decision, 4 FCC 2d 724 (1966).

[78] *See, e.g.*, Competition in the Interstate Interexchange Marketplace, NPRM, 5 FCC Rcd 2627 (1990); Amendment of the Commission's Rules to Prescribe Policies and Regulations to Govern the Interconnection of Private Land Mobile Radio Systems with the Public Switched Telephone Network, Second Report and Order, 89 FCC 2d 741 (1982);

[79] 94 U.S. (4 Otto) 113 (1876).

[80] Federal Radio Comm'n v. Nelson Bros. Co., 289 U.S. 266, 285 (1933).

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[81] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353 (quoting Nebbia v. New York, 291 U.S. 502 (1934)).

[82] *See, e.g.*, Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 561 (defining a public accommodation as a place open to "patronage of the general public"); Osborne v. Ohio, 495 U.S. 103, 135 (1990) (referencing a definition of public nuisance as legally proscribed activities in public places); Crandon v. United States, 494 U.S. 152, 163 (1990) (defining public official as a "person who has been selected to be a public official").

[83] 309 U.S. 134, 137, 138 (1940).

[84] 309 U.S. @ 138.

[85] 309 U.S. @ 137.

[86] National Broadcasting Co. V. United States, 319 U.S. 190, 216 (1943) (quoting 47 U.S.C. @ 303(g) (1940)).

[87] National Broadcasting Co. V. United States, 319 U.S. 190, 216 (1943) (quoting 47 U.S.C. @ 303(g) (1940)).

[88] FCC v. Sanders Radio Stations, 309 U.S. 470, 475 (1940).

[89] National Broadcasting Co. V. United States, 319 U.S. 190, 219-220 (1943).

[90] FCC v. WNCN Listeners Guild, 450 U.S. 582, 593 (1981); FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940).

[91] 326 U.S. 327, 336 (Frankfurter, J., dissenting).

[92] FCC v. RCA Communs., 346 U.S. 86, 91, 93 (1953).

[93] 395 U.S. 367, 385 (1969).

[94] 395 U.S. 367, 385 (1969).

[95] United States v. Midwest Video Corp., 406 U.S. 649, 656 (1972) (citing Sec. 303 (g)).

[96] 406 U.S. @ 680.

[97] Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94, 117 (1973).

[98] 412 U.S. @ 124.

[99] Community TV of Southern California v. Gottfried, 459 U.S. 498, 513 (1983).

[100] 489 U.S. 749 , 774 (1989).

[101] Denver Area Educ. Telecoms. Consortium v. FCC, 116 S.Ct. 2374, *112 (1996).

[102] Richmond Newspapers Inc. v. Virginia, 448 U.S. 555, 577 n. 11(1980)

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[103] 475 US 1 (1986).

[104] 475 US 1, 12 n. 8.

[105] RAV v. St. Paul, 505 U.S. 377, 426 (1992).

[106] *See, e.g.*, First Nat'l Bank v. Bellotti, 435 U.S. 765, 776 (1978).

[107] 403 U.S. 29, 69 (1971).

[108] 418 U.S. 323 (1974).

[109] *See also* Buckley v. Valeo, 424 U.S. 1 (1976) (dissenting) (criticizing the Court's reliance on an "ill-defined 'public interest' to breach the historic safeguards guaranteed by the First Amendment).

[110] 483 U.S. 378 (1987) (ruling that a county clerical worker was improperly fired because her comment, after hearing of an assassination attempt on the President: "If they go for him again, I hope they get him," was protected by the First Amendment interest in free discussion).

[111] Taxation With Representation of Washington, 461 U.S. 540 (1983).

[112] Webster v. Reproductive Health Servs., 492 U.S. 490, 541 (1989).

[113] FCC v. WNCN Listeners Guild, 450 U.S. 582, 594-595 (1981); FCC v. National Citizens Committee for Broadcasting, ,436 U.S. 775, 814 (1978).

[114] Dun & Bradstreet, Inc. V. Greenmoss Builders, 472 U.S. 749, 789 (1985).

[115] W.R. Grace & Co. V. Local Union 759, Intl. Union of the United Rubber, Cork, Linoleum & Plastic Workers, 461 U.S. 757, 766 (1983) (internal citations omitted).

[116] Mistretta v. United States, 488 U.S. 361, 416 US (1989) (Scalia, J., dissenting).

[117] *See, e.g.*, Thomas v. Union Carbide Agric. Products Co., 473 U.S. 568, 585 (1985).

[118] Thomas Streeter, Beyond Freedom of Speech and the Public Interest: The Relevance of Critical Legal Studies to Communications Policy, 40 J. Comm. 43, 60 (1990).

[119] *See, e.g.*, David S. Allen, The Creation of an (In)Active Public Sphere, in David S. Allen and Robert Jensen (eds.), Freeing the First Amendment (1995) 93, at 103-104.

The Viability of the Libel-proof Plaintiff Doctrine Following the Masson Decision

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The Viability of the Libel-proof Plaintiff Doctrine

Following the Masson Decision

ABSTRACT

Defamation laws allow a person to sue for statements that damage his or her reputation. However, a few courts have ruled that some defendants have such poor reputations that they should not be allowed to sue for libel. This paper reviews how courts have ruled on the libel-proof plaintiff doctrine following the Supreme Court's ruling in *Masson v. New Yorker Magazine*, which repudiated part of the doctrine. The analysis showed that it remains a viable defense for media defendants.

Defamation laws allow a person to sue for statements that damage his or her reputation and expose him or her to hatred, ridicule, or contempt.[1] Former Supreme Court Justice Potter Stewart may have summed it up best in *Rosenblatt v. Baer*:

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to redeem. Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to the man whose reputation has been falsely dishonored.[2]

However, a few state and federal courts have ruled that some defendants have such poor reputations that they should not be allowed to sue for libel. These courts have contended that because the best result these "libel-proof plaintiffs" could obtain would be a judgment for nominal damages, it would be unfair to require that media outlets go through the expenses of a full trial. Consequently, the libel-proof plaintiff doctrine rests on the principle that without damage to reputation, there is no defamation.[3]

Almost all of the people classified by the courts as libel-proof plaintiffs have been convicted of multiple felonies. In *Jackson v. Longcope*, a convicted murderer sued the *Boston Globe* for reporting that he had raped and strangled all of his victims and that a shoot-out with police occurred during a stolen-car chase.[4] Jackson contended that he had raped and strangled only some of his victims and that the car was not stolen. The Supreme Judicial Court of Massachusetts, Suffolk, dismissed the case because Jackson's reputation was so poor that no damage could be done to it.[5]

In another case, James Earl Ray sued for libel because of two books that recounted the events leading up to his assassination of civil-rights leader, Dr. Martin Luther King, Jr. One book implicated Ray in the robbery of a British loan company, while the other referred to him as a "narcotics addict and peddler." A U.S. district court ruled that his multiple felony convictions, including one for the King murder, made him libel proof. The district court said that because Ray was so unlikely to receive damages for material on his background and criminal activities, dismissal of his libel claims was warranted.[6]

However, most courts have declined to apply the doctrine to persons with minor criminal convictions. Frank J. Marcone, a Pennsylvania attorney, sued *Penthouse* for an article that called him "an attorney criminal" and narcotics dealer.[7] *Penthouse* argued that because Marcone had been fined $200 for assault and battery on a police officer, had been indicted on drug charges, and had been indicted on tax-evasion charges, he was libel proof. The drug charges were later dropped, and a jury failed to reach a verdict on the tax-evasion charge. "While such evidence suggests that Marcone's reputation was sullied before the article was published, we cannot say as a matter of law that Marcone was libel proof."[8]

In addition, most efforts to apply the libel-proof plaintiff doctrine to persons without criminal convictions have failed. For example, *Time* tried to use this defense when Ariel Sharon, former minister of defense in Israel, sued over a report that he had anticipated—but did not prevent—a massacre at a Palestinian refugee camp. The court agreed with *Time* that Sharon's reputation as a military and political leader had been damaged by the unchallenged facts in the article. Nevertheless, the court ruled that his reputation was not so poor that he could only recover nominal damages.[9]

In contrast, the U.S. Court of Appeals, Second Circuit, found that *Penthouse* publisher Robert Guccione was libel proof concerning adultery allegations. *Hustler* had published an article stating that he was "married and also has a live-in girlfriend." In fact, Guccione had lived with his girlfriend while still married for 13 of the previous 17 years. But he was divorced for four years before the article was published in November 1983. The court found that Guccione's reputation concerning adultery could not have been damaged by the publication of the alleged libel.[10]

The purpose of this paper is to review how state and federal courts have ruled on the libel-proof plaintiff doctrine. In addition, the paper will analyze the viability of the libel-proof plaintiff defense following the U.S. Supreme Court's ruling in *Masson v. New Yorker Magazine*, which repudiated part of the doctrine.[11]

Because the cost of defending libel suits is enormous for media defendants, it is important that cases with little merit be dismissed as soon as possible. If the libel-proof plaintiff doctrine allows trial courts to grant summary judgment, it would be beneficial to the media and help to protect First Amendment values.

LITERATURE REVIEW

The libel-proof plaintiff doctrine has generated considerable controversy since the U.S. Court of Appeals, Second Circuit, became the first court to accept the doctrine in June 1975.[12] Some authors support the doctrine because it allows the judicial system to operate more efficiently through the dismissal of baseless complaints.[13] They argue that judicial resources are wasted if a plaintiff can sue over minor mistakes about the exact number of previous convictions or the circumstances surrounding an arrest.[14]

> Although the absolute number of libel cases is relatively small, their consumption of judicial resources is sometimes vastly disproportionate. This concern, coupled with the First Amendment's directive, has led to a strong policy of disposing of libel claims by summary judgment rather than trial. The libel-proof plaintiff doctrine allows courts to do just that, thereby furthering the interests of judicial economy.[15]

David Marder counters that it is wrong for judges to prevent plaintiffs from attempting to redeem their reputations. "Although courts assert that the doctrine is warranted in order to properly balance first amendment concerns and reputational interests of plaintiffs, a close examination of the weighing process reveals that the balance should be struck in favor of allowing a [legal] remedy."[16] Peyton adds that it is unfair to deny a plaintiff the opportunity to present his case because a judge subjectively rules that he or she has little or no reputation to lose.[17]

Another controversial issue is how to decide which plaintiffs are libel proof. One author contends that the doctrine should apply when the plaintiff has been convicted for behavior similar to that described in the news story. For instance, a convicted bank robber who is called a thief would not have been libeled. In contrast, a bank robber who is called a murderer would have been libeled.[18]

Peyton argues that the arbitrary manner in which courts have invoked the doctrine makes it unfair to libel plaintiffs. She says that the courts have not developed standards for measuring how many offenses or what types of offenses make a person libel proof.[19] In particular, the U.S. Court of Appeals, Sixth Circuit, ruled that James Earl Ray was libel proof, but it declined to apply the doctrine to William Brooks, a habitual criminal with convictions for breaking and entering, grand larceny, first-degree manslaughter, and carrying a concealed weapon.[20] "Consequently, even courts that have applied the doctrine to some plaintiffs with significant criminals records have hesitated to apply it to other such plaintiffs."[21]

Furthermore, authors disagree on whether plaintiffs who have never been convicted of crimes should be libel proof. One author argues that repeated, uncontested negative publicity should prevent plaintiffs from pursuing libel cases. For example, widely reported civil judgments against a libel plaintiff would make him libel proof on similar matters.[22] Hemphill adds that the doctrine would serve little purpose if it only applied to criminals.

> But there is no reason to limit the application of the principles behind the doctrine to murderers and other scoundrels. The idea is simple: an allegedly libelous statement is evaluated in light of the plaintiff's previous reputation. If it appears, as a matter of law, that the plaintiff cannot produce proof of actual damage to reputation, summary judgment is entered for the defendant.[23]

Weaver counters that the doctrine should not apply if the prior allegations that led to the libel-proof claim have not been substantiated. He notes that in *Ronald A. Schiavone v. Time*, the U.S. Court of Appeals, Third Circuit, ruled that a businessman who had been linked to organized crime in hundreds of prior news stories was not libel proof. Schiavone denied the mob connections and had not been convicted for any such crime. "Absent such evidence, however, holding the plaintiff libel-proof under the facts alleged in *Schiavone* would leave open the possibility that the doctrine might be used to deny recovery to a plaintiff whose reputation has been unfairly tarnished by a barrage of prior adverse publicity."[24]

Much of the research conducted on the libel-proof plaintiff doctrine was completed before the Supreme Court's ruling in 1991 in *Masson v. New Yorker Magazine*, which repudiated part of the doctrine.[25] Consequently, it is important to examine how state and federal courts have ruled on the doctrine since this decision. This study will complement earlier research on the libel-proof plaintiff doctrine by examining recent trends in state and federal court rulings and by analyzing whether it remains a viable defense for media defendants.

RESEARCH QUESTIONS, METHOD, AND LIMITATIONS

Did the Supreme Court's decision in Masson v. New Yorker Magazine *affect how state and federal courts have ruled on the libel-proof plaintiff doctrine?*

Does the doctrine remain a viable defense for media defendants?

State and federal cases involving the libel-proof plaintiff doctrine from its inception in June 1975 to the present will be examined. The libel-proof plaintiff doctrine is seldom used, so it is necessary to examine an array of district and appellate court rulings. The cases were identified by searching major legal databases, cross referencing court rulings, and reviewing the *Media Law Reporter.* In addition, cases were identified by using the West key number system for the topic, libel-proof plaintiff. Finally, law, social science and communication journals were searched for articles on the libel-proof plaintiff doctrine.

The paper will not address any area of libel law outside the libel-proof plaintiff doctrine. The reason for this exclusion is that it would be confusing to deal with issues unrelated to this unique area of libel law. Furthermore, this paper will only address the First Amendment issues associated with the libel-proof plaintiff doctrine. It will not cover the due process and equal protection issues raised by denying some plaintiffs the right to pursue libel actions. The due process and equal protection considerations require analysis under the Fifth and Fourteenth amendments, and it is not possible to address all of these issues in one paper. The major limitation with the sources used in this paper is that there is not extensive case law related to the libel-proof plaintiff doctrine. Also, because many of these cases are resolved at the trial court level, the decisions go unreported. Consequently, it is difficult to obtain information about these decisions because they were not published in court reports.

RESULTS

State and federal courts divide libel-proof plaintiff cases into two categories: issue-specific cases and incremental-harm cases. Under the issue-specific branch of the libel-proof plaintiff doctrine, a court examines whether a plaintiff's reputation is so damaged with regard to an issue that he or she is libel proof concerning it. For example, a U.S. district court ruled that James Earl Ray's reputation was so damaged by his assassination of Dr. Martin Luther King, Jr., that he could not be libeled by two books recounting the events leading up to it.[26]

In contrast, under the incremental-harm branch, a court examines the entire news story to measure the harm caused by the alleged libel. If the court finds that the challenged statements cause the plaintiff no harm beyond that caused by the unchallenged statements, a court may dismiss the case.[27]

The first application of the incremental-harm branch occurred in 1981 in *Simmons Ford v. Consumers Union of the United States.* The October 1975 issue of *Consumer Reports* criticized the poor construction and low maximum speed of CitiCar, one of the two electric cars on the market in the United States. Moreover, *Consumer Reports* gave CitiCar a "not acceptable" rating and concluded that it was extremely dangerous and unsuitable for use on a public highway.[28]

Simmons Ford, a retailer of the CitiCar, sued because the article also claimed it did not meet federal safety standards for occupant crash protection. In fact, the car did not meet one of several options for complying with the safety standards. The U.S. District Court for the Southern District of New York said that the portion of the article challenged by Simmons Ford could not have hurt its reputation beyond the harm caused by the remainder of the article. "Given the abysmal performance and safety evaluations detailed in the article, plaintiffs could not expect to gain more than nominal damages based on the addition to the article of the misstatement relating to federal safety standards."[29] While the court said that the case raised "First Amendment interests," it did not say whether its ruling on the libel-proof plaintiff doctrine was based on common law, the state constitution, or the U.S. Constitution.[30]

However, the incremental-harm branch of the libel-proof plaintiff doctrine was largely discredited by subsequent decisions. The U.S. Court of Appeals, District of Columbia Circuit, rejected the incremental-harm branch in November 1984 in

Liberty Lobby v. Anderson. Liberty Lobby filed a libel suit over articles that alleged its founder, Willis Carto, was racist, fascist, anti-Semitic and a neo-Nazi. The articles also said that Liberty Lobby was established to help Carto to pursue his right-wing agenda.[31]

In a decision written by current Supreme Court Justice Antonin Scalia, the court said that the incremental-harm branch was a fundamentally bad idea. In particular, the court discounted the idea that a libel case should be dismissed if the challenged statements cause the plaintiff no more harm than the unchallenged statements. "This apparently equitable theory loses most of its equity when one realizes that the reason the unchallenged portions are unchallenged may not be that they are true, but only that appellants were unable to assert that they were willfully false."[32]

In addition, Scalia maintained that the incremental-harm branch should be rejected because it assumes that a plaintiff's reputation is a monolith that stands or falls in its entirety. Instead, he said, the courts should recognize that the plaintiff's remaining reputation—as limited as it may be—is not inconsequential.

> The law, however, proceeds upon the optimistic premise that there is a little bit of good in all of us—or perhaps upon the pessimistic assumption that no matter how bad someone is, he can always be worse. It is shameful that Benedict Arnold was a traitor; but he was not a shoplifter to boot, and one should not have been able to make that charge while knowing its falsity with impunity.[33]

Scalia concluded that the incremental-harm branch was not part of the District of Columbia law or federal constitutional law.[34]

The U.S. Court of Appeals, Third Circuit, declined to apply the incremental-harm branch in May 1988 in *Schiavone v. Time.* Ronald A. Schiavone and his construction business had been linked to organized crime in hundreds of prior news stories. He and his company sued over a *Time* story that said, "The personal files of FBI Director

William Webster, forwarded to the [Senate] committee last month, reveal that the name of Schiavone appeared several times in the bureau's reports on the 1975 disappearance of former Teamster Boss Jimmy Hoffa."[35]

The court said that the *Time* article could be read as making a new allegation: Schiavone played a part in the notorious disappearance and suspected murder of Jimmy Hoffa. Consequently, this charge was more serious than the previous news stories, and the incremental-harm branch did not apply.

> Although we intimate no general view as to the viability of the libel proof plaintiff doctrine, we hold that under the facts of this case, depending on how a jury determines the sting of Time's article, the plaintiffs may indeed be able to secure compensatory damages and hence could not be libel proof as a matter of law.[36]

However, the incremental-harm branch suffered its most serious blow with the Supreme Court's ruling in *Masson v. New Yorker Magazine*. The U.S. Court of Appeals, Ninth Circuit, ruled that one of the alleged fabricated quotes at issue in Jeffrey Masson's libel suit against Janet Malcolm and the *New Yorker* was not libelous because of the incremental-harm branch of the libel-proof plaintiff doctrine. Masson was quoted as saying that Kurt Eissler and Anna Freud enjoyed his company but felt he was a social embarrassment. "I was like an intellectual gigolo—you get your pleasure from him, but you don't take him out in public." The court ruled that the quote did not cause Masson any more harm than the other provocative statements he made during the tape-recorded interviews.[37]

The Supreme Court ruled that the incremental harm doctrine was not a part of First Amendment law. Justice Anthony Kennedy's decision noted that Masson challenged the most provocative quotes, making the incremental-harm branch inapplicable. In addition, he said that the appeals court was unclear whether it considered the incremental-harm branch part of California law or the U.S. Constitution.

> Here, we reject any suggestion that the incremental harm doctrine is compelled as a matter of First Amendment protection for speech. The question of incremental harm does not bear upon whether a defendant has published a statement with knowledge of falsity or reckless disregard of whether it was false or not. As a question of state law, on the other hand, we are given no indication that California accepts this doctrine, though it remains free to do so.[38]

On remand, the U.S. Court of Appeals, Ninth Circuit, rejected Malcolm's argument that the incremental-harm branch was part of California law.[39]

Only two cases were identified that involved the incremental-harm branch after the *Masson* decision. First, the U.S. Court of Appeals, Ninth Circuit, rejected the incremental-harm branch in *Crane v. Arizona Republic*. Richard P. Crane, Jr., who had directed the Justice Department's Los Angeles Organized Crime and Racketeering Strike Force for 13 years, and James D. Henderson, who was the current head of the strike force, sued over an article in the *Arizona Republic* that claimed they had ties to organized crime. The court of appeals overturned a ruling by the U.S. District Court for the Central District of California that part of the lawsuit should be dismissed because of the incremental-harm branch. The appeals court, citing *Masson*, said the doctrine was not compelled by the First Amendment. In addition, the appeals court reaffirmed its ruling from the *Masson* remand that the doctrine was not a part of California state law.[40]

In the second case, the Church of Scientology sued after *Time* published an article titled "Scientology: The Cult of Greed." The article described the church's alleged efforts to increase revenues by charging higher fees to members, manipulating securities and currency markets, and tax evasion. The U.S. District Court for the Southern District of New York granted summary judgment because actual malice could not be proven. However, the court noted that the U.S. Supreme Court had rejected the incremental-harm branch in *Masson.* Moreover, it declined to rule on whether the incremental-harm branch barred recovery as a matter of state law.[41]

The first application of the issue-specific branch of the libel-proof plaintiff doctrine occurred in June 1975 in *Cardillo v. Doubleday & Co.* Robert L. Cardillo brought a libel suit over a book that accused him of a robbery and fixing a horse race. The book's author, Vincent Teresa, had been a high-ranking mob official who became a government witness against Cardillo and more than 20 other individuals.[42]

The U.S. Court of Appeals, Second Circuit, ruled that Cardillo's felony convictions for stolen securities, bail jumping, conspiracy and interstate transportation of stolen securities, and receiving stolen property made him libel proof. In fact, Cardillo was serving a 21-year sentence in Lewisburg, Pa., for the felony convictions when he filed suit. The appeals court said that Cardillo's reputation was so poor that no jury would award him more than a few cents in damages.

> For we consider as a matter of law that appellant is, for purposes of this case, libel-proof, i.e., so unlikely by virtue of his life as a habitual criminal to be able to recover anything other than nominal damages as to warrant dismissal of the case, involving as it does First Amendment considerations.[43]

The U.S. District Court, District of Columbia, ruled that George B. Logan was libel proof over a *Washington Post* story that incorrectly said he tested positive for drugs after a recent arrest. The court maintained that Logan's reputation could not suffer any more harm because his previous drug use had been widely publicized in a book, he had been convicted of a federal narcotics violation, he was charged with another federal narcotics violation, he had an unlawful entry conviction, and he was serving a sentence for a federal firearms conviction. "Thus, it is highly unlikely that if the plaintiff was to somehow prevail on the legal issues he would be able to recover damages and, therefore, he will be found 'libel-proof' as a matter of law."[44]

Another application of the issue-specific branch occurred in *Wynberg v. National Enquirer.* Henry Wynberg, who had a 14-month relationship with Elizabeth Taylor, sued over an *Enquirer* story that said he used the relationship for his personal gain. However, the U.S. District Court for the Central District of California ruled that his multiple convictions for contributing to the delinquency of minors involving sex and drugs, bribery, prostitution, and grand theft made him libel proof. In addition, Wynberg acknowledged several default judgments and garnishments for failure to pay child support, breach of contract, conversion, and fraud. "It is beyond dispute that Plaintiff's reputation for his treatment of women and his general reputation for integrity, truth, honesty, and fair dealing in personal and business matters is bad."[45]

The court also suggested that anyone who engages in anti-social or criminal behavior that is widely reported is libel proof. Moreover, it said that someone whose general reputation is bad, such as James Earl Ray, could be libel proof on all matters. No other court has provided such an expansive definition for the issue-specific branch.

> Depending upon the nature of the conduct, the number of offenses, and the degree and range of publicity received, there comes a time when the individual's reputation for specific conduct, or his general reputation for honesty and fair dealing is sufficiently low in the public's estimation that he can recover only nominal damages for subsequent defamatory statements.

First Amendment considerations, the court said, must prevail over the individual's interest in his reputation.[46]

A Texas Court of Appeals also accepted the issue-specific branch in *Finklea v. Jacksonville Daily Progress.* The newspaper published articles claiming that Finklea was a convicted methamphetamine dealer who was serving a 12-year sentence for running a burglary ring. In fact, he had not been convicted of selling methamphetamines and was not serving a jail sentence for burglary.[47]

Nonetheless, the court ruled that Finklea's four previous convictions for burglary and theft and two previous convictions for drug-related offenses made him libel proof on these matters.

> It is impossible to envision a Texas jury awarding him any damages. In the unlikely event a verdict for damages was returned, on these facts it would be the duty of the court to set it aside. Under these circumstances, the imposition upon the defendants of the difficulty and expense of a further defense would not serve the purpose of the libel law which is to redress injury to reputation, but would instead place upon them a burden inimical to the vigorous exercise of First Amendment freedoms.[48]

As mentioned above, the issue-specific branch was also used to dismiss the libel suits filed by James Earl Ray,[49] Anthony Jackson,[50] and Robert Guccione.[51]

However, most courts have invoked the issue-specific branch with considerable caution. Sometimes, the same court has seemed to issue contradictory rulings on the issue-specific branch. For example, the U.S. Court of Appeals, Sixth Circuit, ruled that James Earl Ray was libel proof,[52] but it declined to apply the doctrine to William Brooks, a habitual criminal with convictions for breaking and entering, grand larceny, first-degree manslaughter, and carrying a concealed weapon.[53] Consequently, Brooks' libel suit against the American Broadcasting Company for Geraldo Rivera's report calling him a "hitman," "pimp," and "street knowledgeable jive turkey" was allowed to proceed.[54]

In addition, the U.S. District Court, District of Columbia, declined to find William F. Buckley libel proof relative to a book that said he was a fascist who used his journalistic position to spread propaganda. The court maintained that Buckley's reputation could be damaged by a false and defamatory attack and that the issue-specific branch of the libel-proof plaintiff doctrine should be used cautiously.[55]

In another case, the Supreme Judicial Court of Massachusetts refused to use the issue-specific branch to dismiss a libel suit filed by a union official after a news story claimed that the union failed to act on claims filed by members and that the union was sharing confidential information with town officials. The court rejected the argument that Kenneth T. Lyons was libel proof because he had initiated several prior defamation suits.[56]

Furthermore, the U.S. Court of Appeals, Fifth Circuit, ruled that a former deputy sheriff and a detective who had been convicted six years earlier for malfeasance in office and imprisoned did not have such poor reputations to render them libel proof.[57] As discussed earlier, the courts in *Marcone v. Penthouse*[58] and *Sharon v. Time*[59] also declined to use the issue-specific branch to dismiss the libel cases. However, it is important to note that none of these courts reached a judgment on the validity of the issue-specific branch. Instead, they said that it was inappropriate to apply the issue-specific branch because of the facts of the cases, i.e., the plaintiffs did not have such poor reputations that no further damage was possible.

One important issue is how the Supreme Court's ruling in *Masson* will affect the issue-specific branch of the libel-proof plaintiff doctrine. Although the Supreme Court only addressed the incremental-harm branch, the branches have some similarities. In particular, both are based on the concept that without damage to reputation, there is no defamation.[60] "Therefore, it will not be surprising to see courts faced with an issue-specific libel-proof defense reject the doctrine, citing *Masson.*"[61]

Four cases that involved the issue-specific branch and were decided after *Masson* were identified. The Court of Appeals of Texas addressed the issue in *McBride v. New*

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Braunfels Herald-Zeitung. The newspaper published an article claiming that Kirk Wayne McBride had been arrested and charged with aggravated robbery. In fact, the district attorney dropped the charge and McBride had been released from jail. However, McBride had been convicted for theft in 1979, burglary in 1986, and delivery of hydromorphone in 1986. The court ruled that the newspaper failed to prove that McBride's reputation could not have been damaged from the article. "Assuming, without deciding, that this Court accepts the libel-proof plaintiff doctrine, the summary-judgment evidence does not justify applying it to McBride."[62]

The U.S. District Court for the Southern District of New York also declined to use the issue-specific branch to dismiss a libel claim filed against *Time* for publishing Jacqueline Da Silva's photograph along with a caption that indicated she was a prostitute looking for customers. Da Silva had worked as a prostitute in Recife, Brazil, for six years. However, she claimed she had reformed her life, moved to a new community, developed a good reputation, and been married for nine months when the photograph was taken. "As such, a genuine issue of material fact exists as to whether her new reputation could have been and was tainted as a result of the published photograph," the court said.[63]

The issue-specific branch also was cited by the U.S. District Court for the Southern District of New York in its decision in *Church of Scientology International v. Time Warner*, in which *Time* accused the church of trying to increase revenues by charging higher fees to members, manipulating securities and currency markets, and tax evasion. The court granted summary judgment because actual malice could not be proven. However, the court hinted that it still viewed the issue-specific branch favorably. "Dismissal based on the libel-proof plaintiff doctrine is not appropriate at this stage of the litigation, because it requires the Court to make factual findings regarding plaintiff's reputation for a particular trait."[64]

Furthermore, the *Masson* decision was not even discussed in its analysis of the issue-specific branch.

Finally, the same court used the issue-specific branch in 1997 to dismiss a defamation suit filed against Donald Trump and Marla Maples. Charles Jones, a former publicist for Maples, was convicted of unlawfully entering her apartment and stealing her shoes and underwear. The case received widespread publicity in the tabloids. Jones sued for defamation when Trump and Maples discussed the case with the media and others. The court ruled that Jones' reputation had been so badly tarnished by his conviction that he was libel proof with regard to the issue. Consequently, his claims must be dismissed.[65]

CONCLUSION

The Supreme Court's decision in *Masson v. New Yorker Magazine* did affect how state and federal courts have ruled on the incremental-harm branch of the libel-proof plaintiff doctrine. The Supreme Court ruled in *Masson* that the incremental-harm branch was not required by the First Amendment.[66] Moreover, on remand, the U.S. Court of Appeals, Ninth Circuit, rejected Malcolm's argument that the incremental-harm branch was part of California law.[67] In *Crane v. Arizona Republic*, the same court reiterated that the doctrine was not part of First Amendment or California law. In the only other case involving the incremental-harm branch following *Masson*, the U.S. District Court for the Southern District of New York noted that the U.S. Supreme Court had rejected the doctrine. But it declined to rule on whether the incremental-harm branch barred recovery as a matter of state law.[68] Thus, no court has accepted the incremental-harm branch since *Masson*. It seems likely that the incremental-harm branch retains limited use and is not a viable defense for media defendants in most libel cases.

However, there are several ways in which it could be used as a libel defense. First, state courts could rule that it is a part of state constitutional law. All 50 states have free-speech clauses in their constitutions, and it could be argued that these constitutions provide more protection than the First Amendment.[69] In addition, as the Supreme Court noted in *Masson*, state courts remain free to decide whether the incremental-harm branch is a part of state common law. Finally, state legislatures could enact a statute.[70]

One author had suggested that the courts would use the *Masson* ruling to reject the issue-specific branch.[71] This prediction has not materialized. None of the four cases decided since *Masson* has even mentioned it. Thus, the state and federal courts seem to view the issue-specific branch as a separate legal concept.

Furthermore, the courts have followed the same approach with the issue-specific branch as they did before *Masson*. The courts have weighed the damage caused by the news story against the person's existing reputation. If the news story could have caused harm, the libel case goes forward. The courts in *McBride*[72] and *Da Silva*[73] felt that the news stories could have damaged the plaintiffs' reputations. But in the *Jones v. Trump and Maples* case, the court ruled that Jones' reputation had been so damaged by his conviction for unlawfully entering Maples' apartment and stealing her shoes and underwear that he was libel proof.[74]

It seems likely that the courts will continue to follow this balancing approach with regard to the issue-specific branch. Consequently, it remains a viable defense for media defendants in libel cases. Plaintiffs who have been convicted of multiple felonies or a single notorious crime—such as the assassination of a major political figure—probably have little chance of succeeding on their libel claims, particularly when there has been extensive news coverage about their activities. In contrast, plaintiffs with minor criminal convictions probably will be allowed to have their day in court.

The state and federal courts have generally ruled that the issue-specific branch is based on "First Amendment considerations."[75] However, as with the incremental-harm branch, it could be upheld on other grounds, including state tort law or the free-speech clauses in state constitutions.[76]

In conclusion, the cost of defending libel suits is enormous for media defendants. It is important that cases with little merit be dismissed as soon as possible. The issue-specific branch allows trial courts to grant summary judgment. Consequently, it is beneficial to the media and helps to protect First Amendment values. However, the incremental-harm branch probably retains little viability as a libel defense after the *Masson* decision.

ENDNOTES

[1] James A. Hemphill, *Libel-Proof Plaintiffs,* 71 TEX. L. REV. 401, 403 (1992).

[2] Rosenblatt v. Baer, 383 U.S. 75, 92-3 (1966).

[3] Hemphill, *supra* note 1, at 430.

[4] Jackson v. Longcope, 476 N.E.2d 617, 618-9 (Mass. 1985).

[5] Id. at 618.

[6] Ray v. Time, 452 F. Supp. 618, 622 (1976).

[7] Marcone v. Penthouse, 754 F.2d 1072, 1076-7 (3rd Cir. 1985).

[8] Id. at 1079.

[9] Sharon v. Time, 575 F. Supp. 1162, 1163-5 (S.D.N.Y. 1983).

[10] Guccione v. Hustler Magazine, 800 F.2d 298, 298-301 (2nd Cir. 1986).

[11] Masson v. New Yorker Magazine, 111 S.Ct. 2419, 2419 (1991).

[12] Cardillo v. Doubleday & Co., 518 F.2d 638, 638 (2nd Cir. 1975).

[13] Anonymous, *Libel-Proof Plaintiffs,* 98 HARV. L. REV. 1909, 1921 (1985).

[14] Id. at 1925.

[15] Hemphill, *supra* note 1, at 418.

[16] David Marder, *Libel Proof Plaintiffs—Rabble Without A Cause,* 67 B.U. L. REV. 993, 1017 (1987).

[17] Evelyn A. Peyton, *Rogues' Rights: The Constitutionality of the Libel-Proof Plaintiff Doctrine,* 34 SANTA CLARA L. REV. 179, 213 (1993).

[18] Anonymous, *supra* note 13, at 1923.

[19] Peyton, *supra* note 17, at 202.

[20] Brooks v. American Broadcasting Companies, 932 F.2d 495, 497 (6th Cir. 1991).

[21] Peyton, *supra* note 17, at 202.

[22] Anonymous, *supra* note 13, at 1923-4.

[23] Hemphill, *supra* note 1, at 430.

[24] Stephen Weaver, *Analyzing the Limits of the Libel-Proof Plaintiff Doctrine*, 62 TEMP. L. REV. 405, 426-7 (1989).

[25] *Masson*, 111 S.Ct. at 2419.

[26] *Ray*, 452 F. Supp. at 619.

[27] Peyton, *supra* note 17, at 185.

[28] Simmons Ford v. Consumers Union of the United States, 516 F. Supp. 742, 744 (S.D.N.Y. 1981).

[29] Id. at 750.

[30] Id. at 751.

[31] Liberty Lobby v. Anderson, 746 F.2d 1563, 1567 (D.C. Cir. 1984).

[32] Id. at 1568.

[33] Id. at 1568.

[34] Id. at 1569.

[35] Ronald A. Schiavone Construction Company v. Time, 847 F.2d 1069, 1074 (3rd Cir. 1988).

[36] Id. at 1072.

[37] *Masson*, 111 S.Ct. at 2425.

[38] Id. at 2436.

[39] Masson v. New Yorker Magazine, Inc., 960 F.2d 896.

[40] Crane v. Arizona Republic, 972 F.2d 1511, 1514-5 (9th Cir. 1992).

[41] Church of Scientology International v. Time Warner, 932 F. Supp. 589, 590-1 (S.D.N.Y. 1996).

[42] *Cardillo*, 518 F.2d at 639.

[43] Id. at 639.

[44] Logan v. District of Columbia, 447 F. Supp. 1328, 1331-2 (D.D.C. 1978).

[45] Wynberg v. National Enquirer, 564 F. Supp. 924, 928 (C.D. Cal. 1982).

[46] Id. at 928.

[47] Finklea v. Jacksonville Daily Progress, 742 S.W.2d 512, 513 (Tex.App. 1987).

[48] Id. at 517-8.

[49] *Ray*, 452 F. Supp. at 618.

[50] *Jackson*, 476 N.E.2d at 617.

[51] *Guccione*, 800 F.2d at 298.

[52] *Ray*, 452 F. Supp. at 618.

[53] *Brooks*, 932 F.2d at 497.

[54] Id. at 496.

[55] Buckley v. Littell, 539 F.2d 882, 887 (1976).

[56] Lyons v. New Mass Media, 453 N.E.2d 451, 453 (Mass. 1983).

[57] Zerangue v. TSP Newspapers, 814 F.2d 1066, 1067 (5th Cir. 1987).

[58] *Guccione*, 754 F.2d at 1072.

[59] *Sharon*, 575 F. Supp. at 1163.

[60] Hemphill, *supra* note 1, at 430.

[61] Id. at 410.

[62] McBride v. New Braunfels Herald-Zeitung, 894 S.W.2d 6, 10 (Tex.App. 1994).

[63] Da Silva v. Time, 908 F. Supp. 184, 186-7 (S.D.N.Y. 1995).

[64] *Church of Scientology*, 932 F. Supp. at 594-5.

[65] Jones v. Trump, 1997 U.S. Dist. LEXIS 7324 *15 (S.D.N.Y. 1997).

[66] *Masson*, 111 S.Ct. at 2436.

[67] Hemphill, *supra* note 1, at 411.

[68] *Church of Scientology*, 932 F. Supp. at 594.

[69] Hemphill, *supra* note 1, at 412.

[70] *Masson*, 111 S.Ct. at 2436.

[71] Hemphill, *supra* note 1, at 410.

[72] *McBride*, 894 S.W.2d at 11.

[73] *Da Silva*, 908 F. Supp. at 185.

[74] *Jones*, 1997 U.S. Dist. LEXIS 7324 *15.

[75] *Cardillo*, 518 F.2d at 639.

[76] Hemphill, *supra* note 1, at 412.

BUILDING BRIDGES:

Metaphors and Analogies Used by Courts in Cases Involving the Internet

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BUILDING BRIDGES:

METAPHORS AND ANALOGIES USED BY COURTS IN CASES INVOLVING THE INTERNET

ABSTRACT

Increased Internet use in recent years has resulted in increased litigation and legislation surrounding speech via this new medium. In order to adjudicate these cases, courts have looked to a variety of regulatory models for guidance. This paper examines the models courts have used in their attempts to adjudicate questions of defamation, indecency and interstate commerce. Specifically, this paper will examine the application of the publisher, distributor, commerce clause, and broadcasting models.

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BUILDING BRIDGES:

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> "Metaphors are a way of bridging understanding and take you to the point where you are finally comfortable with the technology."
>
> Mike Godwin, lead counsel, Electronic Frontier Foundation [1]

> "Analogy is the only real road map for courts when technological change leaves them in unknown legal territory."
>
> Linda Greenhouse[2]

Ten years ago, a majority of the American public did not know what the Internet was. Only a few million Americans had access to the Net,[3] most of them through their employers or universities. Personal computers sales were rising, but accessing the Internet from home was virtually unheard of, mostly due to the constraints of the available technology.[4]

Today, the Internet is everywhere. Businesspeople distribute their electronic mail addresses as frequently as they give out their phone numbers. Establishing a web presence is a standard part of a corporate image, and the address for that web page can be found on billboards, in television advertisements, and even on the side of delivery trucks. Those who venture onto the information superhighway can find everything from popular music to government documents, and it can all be accessed from the comfort of their own homes.

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[1] Symposium, *Regulating the Internet: Should Pornography get a Free Ride on the Information Superhighway?* 14 CARDOZO ARTS & ENT. L. J. 343, 348 (1996).

[2] Linda Greenhouse, *What Level of Protection for Internet Speech?* N. Y. TIMES, Mar 24, 1997, at C5.

[3] *See* Paul Andrews, *Internet Gateways - New Doors to the Net are Opening Everywhere these Days, with Providers Ranging from Entrepreneurial Mom-and-Pop Shops to the 'Big Boys,'* SEATTLE TIMES, Jan. 28, 1996, at C1.

[4] Modems in the late 1980s ran at the standard speeds of 1200 or 2400 bytes per second (bps) and had to be purchased separately. Today, modems are usually considered to be a standard component of a new PC and come in speeds of 9600 bps, 14.4 kbps (kilobytes per second), 33.6 kbps, and 56.6 kbps.

One result of this phenomenal growth has been an increase in litigation surrounding Internet users and the content of their speech in these online forums. Questions regarding libel in cyberspace and privacy of Internet users have come before the courts in recent years. Another result has been an increase in attempts both by state legislatures and by the United States Congress to enact legislation governing what types of speech can and cannot take place on the Internet. Cases questioning the constitutionality of such laws have already reached the U.S. Supreme Court,[5] as well as the U.S. District Courts for the Southern District of New York[6] and the Eastern District of Pennsylvania,[7] and New York Supreme Courts.[8]

The purpose of this paper is to analyze the legal metaphors and analogies these courts have used in their attempts to apply existing legal precedents to communications that take place via the Internet. Although a complete discussion of the power the choice of a legal metaphor has over the adjudication of a specific case is beyond the scope of this paper, this paper will attempt to analyze specific applications of metaphors to this new medium of communication. The first section of this paper will provide the reader with an explanation of the fundamental concepts that are essential to a working knowledge of the Internet and cyberspace as they are discussed in this paper. Section two will review pertinent articles from the body of literature already in existence concerning this topic. Section three will discuss the specific research questions this paper will answer, as well as the primary sources that provide the basis for the research. Section four will address the regulatory models already in existence and how the courts have applied them to the Internet, and conclusions will be reached in section five.

BACKGROUND

In order to understand some of the terminology used within the text of this paper, it is essential for the reader to have a working knowledge of a few basic concepts surrounding Internet use. One such concept is the word "cyberspace." Although the term is peppered throughout the discussion of Internet technologies and regulation, few authors define what they perceive as cyberspace. The term was originally coined by author William Gibson in his novel *Neuromancer* and was used to describe the landscape of the future where electron states, magnetic fields, commerce and industry compose the venue for common human interactions.[9] In the current vernacular, however, cyberspace generally refers to the communities of computer users who communicate regularly via the Internet.

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[5] Reno v. American Civil Liberties Union, 117 S. Ct. 2329 (1997).

[6] Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991); American Library Association v. Pataki, 1997 U.S. Dist. Lexis 8793 (S.D.N.Y. 1997); Shea v. Reno, 930 F. Supp 916 (S.D.N.Y. 1996).

[7] American Civil Liberties Union v. Reno, 929 F. Supp. 824 (E.D.Pa. 1996).

[8] Stratton Oakmont, Inc., v. Prodigy Services, Inc., 1995 N.Y. Misc Lexis 229 (N.Y. Sup. Ct. 1995).

The Internet itself is a giant computer network that connects smaller groups of computer networks around the world.[10] Begun in 1969 as an experimental project of the Advanced Research Project Agency, the Internet, then called ARPANET, was established as a means to maintain communication between the government and major science and technology research centers in case of a war or national emergency.[11] The Internet has grown to the point that it now supports more than 40 million users a day.[12]

People gain can access to the Internet in many ways, the most popular being through employers, universities, or Internet Service Providers.[13] Also known as ISPs or online services, Internet Service Providers offer dial-up access to a computer connected to the Internet.[14] ISPs allow subscribers access to content within their system as well as access to the Internet beyond.

The U.S. District Court for the Eastern District of Pennsylvania recognized in *American Civil Liberties Union v. Reno* the six basic means of communication via the Internet, the first of which is one-to-one messaging known as electronic mail, or e-mail. E-mail is sent from one individual to another at a specific address. Mail can also be sent from one person to many people at the same time by way of a mail exploder or listserv.[15] The mail exploder will copy the mail sent to it and distribute copies to all the people subscribed to that list. USENET newsgroups work in a similar fashion, except rather than having to subscribe to the list in advance, users can access the archive of messages at any time. Newsgroups can be found that discuss a wide variety of topics, ranging from aardvarks to zygotes and nearly everything in between. Both newsgroups and listservs are used primarily for discussion purposes.

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[9] David J. Loundy, *E-Law: Legal Issues Affecting Computer Information Systems and Systems Operator Liability*, 3 ALB. L. J. SCI. & TECH. 79 (1993)(citing Mitchell Kapor & John P. Barlow, *Across the Electronic Frontier*, July 10, 1990, available over Internet by anonymous FTP at FTP.EFF.ORG.)

[10] The majority of these technical definitions are taken from the Findings of Fact in American Civil Liberties Union v. Reno, 929 F. Supp. 824, 830 (E.D. Pa 1996).

[11] TRACY LAQUEY, THE INTERNET COMPANION 25 (1994).

[12] 929 F. Supp 824 at 831.

[13] *Id.* at 833.

[14] *Id.* at 833.

The fourth manner of communication is real time communication, such as a chat room.[16] Real time communications occur when one user is typing messages that appear on the screen of the other user almost instantaneously.[17] The last two recognized means of communication, real time remote computer utilization and remote information retrieval, have yet to reach the courts and for that reason will not be discussed in this paper.[18]

Another definition that is crucial to comprehension of the issues within this paper is that of a systems operator. More frequently called a sysop, a systems operator is the person responsible for maintaining the computer on which the chat rooms, listservs, or other means of communication are based. Sysops are often well known within the virtual communities they care for as they often step in to moderate disputes between users and are often primary content creators.

LITERATURE REVIEW

Literature discussing legal analogies used by courts in their attempts to apply existing legal precedents to this emerging technology can be found in scholarly publications as well as newspapers and magazines. This is due in part to the pervasiveness of the Internet within society as a topic of both legal and social discussion. For ease of discussion within this paper, the bulk of the literature can be divided

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[15] *Id.* at 834.

[16] *Id.* at 834.

[17] *Id.* at 835.

[18] Real time remote computer utilization, sometimes known as telnet, allows the user to access a computer in another location. The most popular application of this use would be through telnet applications allowing students to peruse the electronic card catalog of libraries at other universities. Remote information retrieval allows the user to search for and download information that is located on other computers. This is done in one of three ways: (1) File Transfer Protocol (also known as ftp), which lists the files available on a remote computer and allows the user to transfer those files back to his computer; (2) gopher, which allows a guided search through materials available on a remote computer; or (3) via the World Wide Web, a format that uses hypertext markup language in conjunction with programs known as "browsers" that can display these HTML documents containing text, sound, images, animation, video, and links to other resources. *Id.* at 836.

into two categories: (1) that which argues that the Internet differs significantly from any existing model and requires a fresh approach and (2) that which argues that an applicable analogy for the Internet can be found among the existing metaphors.

The majority of the authors reviewed argued that an applicable and accurate analogy could not be found among the options currently available. Of those who took this position, Mike Godwin and Barbara Bennett Woodhouse articulated the problems of regulatory metaphors very well, yet offered no solutions to these problems. Mike Godwin argued that it is "immediately apparent that (the Internet) is very different" from other regulatory models being considered.[19] Speaking at the same symposium, Barbara Bennett Woodhouse said, "We cannot simply take a law that applies in one context, slap it down in another, and expect it to work."[20]

Patrick O'Neill also argued that no existing metaphor provides the depth necessary to encompass all levels of Internet communications.[21] However, unlike Godwin and Woodhouse, he also offered a suggestion as to the direction in which First Amendment models should turn. O'Neill's ideal paradigm would replace the media-specific paradigms currently in use with models that account for the emergence of computers and digital networks as a predominant form of communication.[22]

The remaining authors who said existing metaphors are insufficient can be placed into two subcategories: (1) those who argue that the content of the message, not the medium by which it travels, should be the subject of the regulations; and (2) those who argue that any regulation at all will harm the potential of the medium.

David Johnson and Kevin Marks argued the former position quite thoroughly.[23] Johnson and Marks contended the best way to preserve the rights of those using electronic communications networks is to emphasize basic principles of fairness and justice, using legal metaphors such as broadcasting or common carriers as examples only when they suit the facts of a certain case.[24] Johnson and Marks began their argument by saying people want to impose a pre-existing legal metaphor because there are aspects of online communications (such as libel, privacy, and intellectual property) that are similar to problems for which legal remedies already exist.[25] They argued, however, that cyberspace is best regulated through contractual agreements between users and service providers, rather than through what they viewed as ill-fitting legal metaphors.

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[19] SYMPOSIUM, *supra* note 1, at 347.
[20] *Id.* at 360.
[21] Patrick O'Neill, *Optimizing and Restricting the Flow of Information: Remodeling the First Amendment for a Convergent World*, 55 U. PITT. L. REV. 1057, 1059 (1994).
[22] *Id.*

The three metaphors that would be most relevant in their opinion are publishers, distributors, and common carriers.[26] However, Johnson and Marks were quick to point out what they believe to be the inadequacies of each metaphor. They called the publisher model inaccurate because it implies that the publisher has editorial control over content, something few sysops have.[27] Yet a distributor model would not be effective either as distributors do not contribute to the content they disseminate, but many sysops also participate in the electronic forums that they supervise.[28] Finally, the idea of a common carrier model also proved unsatisfactory because common carriers must, by law, carry all content without discrimination.[29] Acceptance of this model would prevent sysops from denying access to people who have violated the behavioral norms of the online community.[30]

Another popular analogy is that of broadcasting. The usefulness of this metaphor was refuted in an unsigned legal note titled *Message in the Media – The First Amendment and the Information Superhighway*.[31] In this article, the author argued that the rationales for regulating broadcast communication, namely spectrum scarcity and pervasiveness, are actually attempts to prevent viewpoint

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[23] David R. Johnson and Kevin A. Marks, *Mapping Electronic Data Communications Onto Existing Legal Metaphors: Should We Let Our Conscience (And Our Contracts) Be Our Guide?* 38 VILL L. REV. 487, 488 (1993).
[24] *Id.*
[25] *Id.* at 490.
[26] *Id.* at 491.
[27] *Id.* at 492.
[28] *Id.* at 494.
[29] 47 U.S.C. §202(a) (1988).
[30] Johnson and Marks, *supra* note 23 at 496.
[31] *Message in the Media – The First Amendment and the Information Superhighway*, 107 HARV. L. REV. 1062 (1995).

scarcity and domination of one type of content over others, respectively.[32] The author went on to say that the infinite "channels" of discussion provided by the Internet will prevent viewpoint scarcity, and the interactivity of the Internet will shift editorial control of content to the users, thus ensuring a diverse content base.[33] The author closed by suggesting that all regulation of the Internet be broad, balanced, and provide basic First Amendment protections for all transmitted speech.[34]

Thomas Krattenmaker and L.A. Powe, Jr., also addressed the comparison between broadcasting and Internet communications.[35] Although the analogy did not receive extensive discussion, the authors expressed a sentiment that is common among authors who believe the proper analogy does not currently exist. Krattenmaker and Powe argued that "the latest advances in telecommunications provide federal courts the opportunity to discard the inherently silly notion that freedom of speech depends upon the configuration of the speaker's voicebox or mouthpiece."[36]

Meanwhile, Anne Wells Branscomb was one of two authors reviewed who argued that any regulation of cyberspace should be approached carefully as it would harm the development of on-line communities.[37] While she did not advocate a complete lack of regulation, Branscomb cautioned those in positions of legal authority that, if the Internet is given the chance to grow and flourish, it is very possible that the role of the nation or state as the determinant of acceptable behavior may be displaced by smaller "virtual communities" that create their own behavioral norms.[38] Branscomb implored lawyers and their clients to be cautious in their approach to litigation regarding the Internet, and challenged anyone who is given the opportunity to "cast the net of existing laws" over the Internet not to do so without first experiencing this community known as cyberspace.[39] Lawrence Lessig echoed this sentiment in his article

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[32] *Id.* at 1074, 1079.
[33] *Id.* at 1081.
[34] Id. at 1096.
[35] Thomas G. Krattenmaker and L. A. Powe, Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 YALE L. J. 1719 (1995)
[36] *Id.*
[37] Anne Wells Branscomb, *Anonymity, Autonomy, and Accountability: Challenges to the First Amendment in Cyberspace*, 104 YALE L.J. 1639 (1995).
[38] *Id.* at 1641
[39] *Id.* at 1679

The Path of Cyberlaw. Lessig said a "prudent Court would let these issues evolve, long into the revolution, until the nature of the beast became a bit more defined."[40]

There are, however, a few authors who contend one or more of the existing models could prove useful in regulating the Internet. Andrew Spett found sufficient correlations between the Internet and cable television to warrant the use of that metaphor in his article *A Pig in the Parlor*.[41] Spett argued that a consumer of information off the Internet acts just like a cable television subscriber since both must make a series of affirmative decisions that bring the content into their homes, regardless of whether that affirmative decision comes in the form of clicking a mouse or paying the monthly cable bill.[42]

Phillip Miller disagreed, arguing that cable is an insufficient metaphor due to the absence of franchise agreements in cyberspace.[43] In his article *New Technologies, Old Problem*, he provided a substantial history of the regulation of telephones, radio, television, and cable, explaining why he found each to be lacking. According to Miller, broadcasting is not an accurate analogy either, because the Internet does not use the public airwaves.[44] Miller finally settled on the publisher metaphor, saying it would provide the service providers with sufficient First Amendment protection.[45]

Two more authors found a way to reconcile the new technology and existing legal models. They did so through combining multiple models. Both Eric Schlachter and David Loundy argued that the existing regulatory models are more than sufficient if applied to individual functions of the Internet. According to Schlachter, these function-specific models would eliminate some of the problems that the use of one over-arching analogy would cause.[46] Schlachter said the point-to-multi-point dissemination of messages posted to newsgroups would warrant a broadcasting metaphor while the one-to-one nature of electronic mail should be accorded the full protection of physical mail.[47] Under Schlachter's models, real-time video conferencing should be compared to a common carrier because the service provider has no idea of or control over the content, and information dissemination systems should be considered distributors because they merely distribute the information without prior knowledge of its content.[48]

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[40] Lawrence Lessig, *The Path of Cyberlaw*, 104 YALE L. J. 1743, 1754 (1995).
[41] Andrew Spett, *A Pig in the Parlor: An Examination of Legislation Directed at Obscenity and Indecency on the Internet*, 26 GOLDEN GATE U. L. REV. 599, 621 (1996).
[42] *Id.*
[43] Philip Miller, *New Technologies, Old Problem: Determining the First Amendment Status of Electronic Information Services*, 61 FORDHAM L. REV. 1147, 1190 (1993).
[44] *Id.*
[45] *Id.* at 1191.
[46] Eric Schlachter, *Cyberspace, the Free Market, and the Marketplace of Ideas: Recognizing Legal Differences in Computer Bulletin Board Functions*, 16 HASTINGS COMM/ENT L. J. 87 (1994).

Loundy's classifications are quite similar to those Schlachter presented.[49] Loundy asserted that the use of publisher and distributor metaphors, while accurate, are possibly overly broad. He based this assertion on the decision of the U.S. District Court for the Southern District of New York in *Cubby, Inc. v. CompuServe, Inc*, an indecency case that relied upon the publisher regulatory model to decide a defamation issue.[50] Like Spett, Loundy applied the analogy of cable television, saying that information must be actively obtained from the Internet and cannot be passively received as it can with broadcasting.[51] Loundy also argued that electronic mail should be treated as physical mail that is passed through the U.S. Postal Service,[52] and that for most other reasons (newsgroups, chat rooms, and other network transmissions), an Internet Service Provider should be treated as a common carrier.[53]

In summation, there are many different approaches that can be taken to the problem of finding legal analogies for the Internet. Some authors suggested that the correct analogy already exists while others argued that the development of a new medium requires the development of a new paradigm. Still others argued that the proper approach would be to combine different aspects of current regulatory models in order to account for the different aspects of Internet communication. However, of the literature reviewed, only the publisher and distributor models were discussed in application rather than in theory. This paper will attempt to update the literature by discussing the manner in which courts have applied other regulatory models in recent years.

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[47] *Id.* at 90.
[48] *Id.* at 91.
[49] David J. Loundy, *E-Law: Legal Issues Affecting Computer Information Systems and Systems Operator Liability*, 3 ALB. L. J. SCI. & TECH. 79 (1993).
[50] *Id.* at 140. *See also infra* notes 58-68 and accompanying text for explanation.
[51] *Id* at 151.
[52] *Id.* at 143.
[53] *Id.* at 141.

RESEARCH QUESTIONS AND METHODOLOGY

After reading the literature available on this topic, one will note the severe lack of analysis of recent court decisions and the effect each court's choice of legal metaphor had on the outcome of the case and adjudication of issues concerning the Internet as a whole. This paper will endeavor to fill that void by addressing the following questions:

1: What analogies and/or legal metaphors have the courts used in cases concerning the Internet in order to facilitate the application of existing law and legal precedent to communications within cyberspace?

2: How does the selection of a particular analogy or metaphor affect a court's ruling as to the degree or types of regulation that will be allowed?

3: Do these legal metaphors sufficiently encompass the scope of the new technology in question?

These questions will be answered through examination of the following cases: *American Civil Liberties Union v. Reno*[54] and its appeal to the United States Supreme Court, *Cubby, Inc. v. CompuServe, Inc.*,[55] *Stratton Oakmont, Inc., v. Prodigy Services, Inc.*,[56] and *American Library Association v. Pataki.*[57]

ANALOGIES AND THEIR CURRENT APPLICATIONS

This section of this paper will address four of the regulatory models courts have applied to Internet communications and the specific cases in which these analogies were utilized. The first part of this section will compare and contrast the publisher and distributor metaphors and how the applications of these models in *Stratton Oakmont, Inc. v. Prodigy Services, Inc.* and *Cubby, Inc. v. CompuServe, Inc.*, respectively, affected the rulings of the courts. The second part will address the Commerce Clause and its application in *American Library Association v. Pataki*. The third part will focus on the broadcast model and the reactions of both the U.S. District Court for the Eastern District of Pennsylvania and U. S. Supreme Court to its implied applicability based on the wording of the Communications Decency Act.

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[54] 929 F. Supp. 824 (E. D. Pa. 1996), *aff'd*, 117 S. Ct. 2329 (1997).
[55] 776 F. Supp. 135 (S.D.N.Y. 1991).
[56] 1995 N.Y. Misc Lexis 229 (N.Y. Sup. Ct. 1995).

Publisher Model versus Distributor Model

While information publishers and information distributors may appear to be quite similar, the difference between the two regulatory models emerges when one begins to discuss standards of liability for defamatory content. The distinction between a publisher of information and a distributor of information lies in the amount of editorial control the party in question has over the material it provides to the public.

Publishers of information are considered to be liable for defamatory content because their employees select what information will be published and edit it prior to its distribution to the public.[58] The U. S. Supreme Court in *Miami Herald v. Tornillo* held that a publisher, in this case a newspaper, is more than just a "passive receptacle or conduit for news, comment and advertising."[59] However, with this decision to exercise editorial control, the publisher accepts liability for defamatory content.

Distributors, on the other hand, are considered to be passive conduits of information who are only liable for repeating defamatory content if they knew or had reason to know of its existence. The U. S. Supreme Court established this standard in *Smith v. California* when the Court decided that requiring booksellers to be familiar with the contents of each book on their shelves could substantially hinder the flow of information the First Amendment was designed to protect.[60]

One of the issues in *Cubby, Inc. v. CompuServe, Inc.*, the first reported cyberspace libel case to come before a U.S. District Court, was whether or not the service provider was to be considered a publisher or a distributor of the defamatory content.[61] In *Cubby*, the plaintiff claimed that CompuServe was liable for a defamatory statement that was made within *Rumorville*, a newsletter that was published within one of its discussion forums by Don Fitzpatrick and Associates. CompuServe argued that since the

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[57] 1997 U.S. Dist. Lexis 8793 (S.D.N.Y. 1997).
[58] KENT R. MIDDLETON ET AL. THE LAW OF PUBLIC COMMUNICATION 98 (4th ed. 1997).
[59] 418 U.S. 241, 258 (1974).
[60] 361 U.S. 147 (1959).
[61] 776 F. Supp. 135 (S.D.N.Y. 1991).

newsletter was compiled and uploaded daily by an outside content provider, CompuServe had no editorial control over the content of the newsletter and therefore should be viewed as a distributor rather than a publisher.

In his decision, Judge Peter Leisure compared CompuServe to an "electronic, for-profit library" that has no more editorial control over the content of its forums than a public library or book store has over its contents.[62] He went on to say:

> A computerized database is the functional equivalent of a more traditional news vendor, and the inconsistent application of a lower standard of liability to an electronic news distributor such as CompuServe than that which is applied to a public library, book store, or newsstand would impose an undue burden on the free flow of information.[63]

Judge Leisure held that CompuServe's lack of editorial control over the messages posted by its subscribers made CompuServe a distributor of information that could only be held liable if it knew or had reason to know of the allegedly defamatory statements.[64]

Use of the publisher model as a legal metaphor when dealing with cybercommunications was not initiated until four years later in the case of *Stratton Oakmont, Inc. v. Prodigy Services, Inc.*[65] In *Prodigy*, the investment firm of Stratton Oakmont filed a defamation suit against Prodigy Services, Inc., based on allegedly defamatory statements made within one of Prodigy's discussion groups. Lawyers for Stratton Oakmont sought to distinguish the *Cubby* decision, saying that unlike CompuServe, Prodigy assumed the responsibilities of an editor by screening new postings and marketing itself as a "family-oriented" bulletin board service, thus making the service provider a publisher rather than a distributor.[66] Prodigy argued that it had abandoned its policy of manually reviewing all messages prior to the posting of the messages in question, and therefore it should be considered a distributor under the guidelines set forth in *Cubby*.

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[62] *Id.* at 140.

[63] *Id.*

[64] Id. at 141.

[65] 1995 N.Y. Misc. Lexis 229 (N.Y. Sup. Ct. 1995).

[66] MIDDLETON ET AL., *supra* note 58, 99 (4th ed. 1997).

Judge Stuart Ain found two key differences between the practices of CompuServe and those of Prodigy. First, Prodigy held itself out to the public and to subscribers as controlling the content of its bulletin boards whereas CompuServe made it known that much of its content was created by independent contractors and uploaded without prior review.[67] Second, Prodigy actively used technology and manpower to delete messages found to be offensive or in bad taste, thus exercising editorial control as described in *Miami Herald v. Tornillo*. As a result of these practices, Ain found that "Prodigy's conscious choice, to gain the benefits of editorial control, has opened it up to a greater liability than CompuServe and other computer networks that make no such choice."[68]

Currently, the publisher model can no longer be applied to Internet service providers in matters concerning speech of a third party. An unchallenged section of the Communications Decency Act of 1996 states that "no provider or user of an interactive computer service shall be treated as the publisher of information provided by another content provider."[69] This prohibition prevents service providers from being held liable for defamation by users whose speech may or may not be monitored. Service providers are, however, still liable for the content of their own speech.

The distributor model, however, is still acceptable, as can be seen in the recent case of *Zeran v.American OnLine*.[70] In *Zeran*, plaintiff Kenneth Zeran notified America OnLine (AOL) of content within its discussion forums that Zeran found to be defamatory.[71] When AOL did not remove the offending messages from their discussion forums at Zeran's request, the plaintiff sued AOL for defamation, claiming that, as a distributor of information, AOL became liable for the defamatory content by allowing it to remain in circulation after having been notified of its existence. The Fourth Circuit Court of Appeals said Zeran was actually asking AOL to exercise editorial control and thus act as a publisher. The court went on to point out that under the CDA, publishers are not liable for the speech of third parties, eliminating the use of the publisher model as a standard for defamation prosecutions. The Supreme Court let stand the decision of the Fourth Circuit Court of Appeals in June 1998 by refusing to hear the case on appeal.[72]

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[67] 1995 N.Y. Misc. Lexis 229 (N.Y. Sup. Ct. 1995).
[68] *Id.*
[69] 47 U.S.C. §230(c).
[70] 129 F.3d 327 (4th Cir. 1997).
[71] Specifically, the content in question was a series of postings within discussion forums that advertised t-shirts with slogans praising the bombing of the Alfred P. Murrah Federal Building in Oklahoma City in

Commerce Clause Model

In some instances, courts have chosen to look to even more basic models for guidance. In its most elemental state, the Internet is little more than a network of computers running through multiple states and countries for the purpose of allowing the transmission of information. When defined as such, the Internet is quite similar to a highway or railroad. Thus, once the Internet has been analogized to an instrument of interstate commerce, courts can then apply the Commerce Clause of the United States Constitution, which gives Congress the power to regulate commerce among the states.[73]

The most recent use of this analogy can be seen in the decision of the U.S. District Court for the Southern District of New York in *American Library Association v. Pataki.*[74] In this case, the American Library Association, in conjunction with fourteen other plaintiffs, sought a preliminary injunction against a New York state statute they felt was unconstitutional, contending it placed an undue burden on free speech and interstate commerce.[75] The state of New York contended the statute, designed to protect minors from on-line pornography, was meant to apply solely to intrastate communications. However, as Judge Loretta Preska pointed out in granting the preliminary injunction, there was no language in the act requiring that the communication take place entirely within the state of New York.

April 1995. Those interested in purchasing the shirts were encouraged to call "Ken" at the phone number listed. Zeran claimed he had no knowledge of the source of these advertisements.

[72] Mike Snider, *High court won't hear case against Net provider*, USA TODAY, June 23, 1998, at D1.

[73] U.S. CONST. art. 1 § 8 cl. 3.

[74] 1997 U.S. Dist. Lexis 8793 (S.D.N.Y 1997).

[75] The section of the statute in question read as follows: "A person is guilty of disseminating indecent material to minors in the second degree when:. . . (3) Knowing the character and content of the communication which, in whole or in part, depicts actual or simulated nudity, sexual conduct or sadomasochistic abuse, and which is harmful to minors, he intentionally uses any computer system allowing the input, output, examination or transfer, of computer data or computer programs from one computer to another, to initiate or engage in such communication with a person who is a minor." *Id.* (quoting N.Y. Penal Law § 235.21(3)).

Judge Preska based her application of the Commerce Clause on three points: (1) The statute represented an unconstitutional projection of New York law into conduct occurring outside the state; (2) the burdens the statute would place on interstate commerce would outweigh any local benefits; and (3) the Internet should be set aside as a national preserve to protect users from inconsistent legislation that, at the extreme, could harm not only the users, but the growth of the medium itself.[76]

In support of her claim that the Commerce Clause was indeed applicable, Judge Preska extensively discussed the nature of Internet communications. She emphasized the lack of geographic bounds in cyberspace, the fact that no aspect of the Internet can be feasibly closed to users from a single state, and the circuitous route information may take in its transmission from machine to machine.[77] Preska went on to say that even if the statute were constitutional under the Commerce Clause, the limited local benefits from the act would not outweigh the burden that would be placed on interstate commerce by the chilling effect Internet users would feel as a result.[78] Finally, Preska concluded by saying that the Internet is a type of commerce that demands "consistent treatment" and is therefore only susceptible to regulation at the national level.[79] Therefore, under the Commerce Clause regulatory model, all state statutes that attempt to regulate communications via the Internet should be found unconstitutional since they are trying to regulate at the state level something that is only susceptible to federal regulation.

Broadcasting Model

The most well-known of the legal metaphors discussed in this paper is that of the framework of broadcasting regulation. The most common perception of the Internet among the American public includes a healthy dose of indecent content.[80] This perception coupled with restrictions placed on indecent communications within broadcast media can lead to the belief that the broadcasting model would be a good fit for Internet communications.

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[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *See* Philip Elmer-DeWitt, *Cyberporn*, TIME, July 3, 1995 at 38.

In order to understand why this is not necessarily the case, one must be familiar with the background of restrictions on indecent speech within the broadcast media. Legally speaking, the term indecency refers to a category of speech that is less offensive than obscenity and that enjoys full First Amendment protections in the print media, but that may be restricted in the broadcast media. The U. S. Supreme Court ruled in *FCC v. Pacifica Foundation* that indecent speech could be regulated within broadcast media due to broadcasting's pervasive nature and its unique accessibility to children.[81] In this decision, the FCC definition of indecency – speech or programming depicting or describing sexual or excretory activities or organs in a manner patently offensive to the community standards for broadcasting – was applied. That definition was adopted by legislators who framed the Communications Decency Act of 1996.[82]

The Communications Decency Act (CDA) of 1996 would have prohibited the transmission of indecent material to minors via the Internet. It provided:

> Whoever in interstate or foreign communications knowingly uses any interactive computer service to display, in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication . . . shall be fined, imprisoned not more than two years, or both.[83]

As can be seen from the text, the CDA was written with the broadcast definition of indecency in mind and would have prohibited communication of speech on the Internet that is otherwise protected if communicated via any other medium with the exception of broadcasting.

This section of the CDA led the American Civil Liberties Union, along with nineteen other plaintiffs, to file for a preliminary injunction against the act in the U.S. District Court for the Eastern

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[81] 438 U.S. 726 (1978).

[82] MIDDLETON ET AL., *supra* note 58, at 556.

[83] ACLU v. Reno, 929 F. Supp 824, 850 (E. D. Pa. 1996) (quoting from 47 U.S.C. § 223(d)).

District of Pennsylvania.[84] The plaintiffs contended that the act would infringe upon adults' rights to free speech as protected by the First Amendment and the Due Process Clause of the Fifth Amendment.

All members of the three-judge panel agreed that the CDA, as worded, was unconstitutional. However, of the three judges, Judge Stewart Dalzell in a concurring opinion was the most vocal in his belief that broadcasting is not the proper legal metaphor by which to apply legal precedent to the Internet. After defining indecency through the Supreme Court's decisions in *Pacifica* and *Sable Communications v. FCC*,[85] which involved telephone communications, Judge Dalzell questioned the efficiency of the broadcasting model, noting that the government's argument that regulation of indecent speech on the Internet is justified under the Court's ruling in *Pacifica* "assumes that what is good for broadcasting is good for the Internet."[86] Specifically noted was the Court's ruling in *Bolger v. Youngs Drug Products* that *Pacifica* could not be extended past broadcasting to apply to unsolicited mailings.[87] Eventually, Dalzell rejected the broadcasting model set forth by the government by distinguishing the Internet from any of the media covered by the existing canon of broadcasting cases.[88]

The preliminary injunction was granted by the three-judge panel. However, the wording of the CDA provided for an appeal directly to the Supreme Court in the event of a challenge such as this. In hearing the case on appeal, the Supreme Court upheld the lower court's decision that the "indecent transmission" and "patently offensive display" provisions did abridge the First Amendment's protections for freedom of speech.[89] In the majority opinion, the Court also rejected the use of broadcasting as a regulatory model for the Internet. In oral arguments, the government had relied on the history of government regulation of broadcast media as a justification for the restrictive measures within the CDA.[90] Justice Stevens refuted that argument, saying that frequency scarcity and broadcasting's invasive nature as set forth in *Sable* are not issues in cyberspace and, therefore, neither *Pacifica* nor *Sable* was controlling.[91] In two brief paragraphs, the Court eliminated the use of the broadcasting as a sufficient metaphor for legislative bodies attempting to regulate the Internet and courts attempting to adjudicate questions concerning communications via the Internet.

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[84] A similar motion for a preliminary injunction was filed by Joe Shea on behalf of the American Reporter in the U. S. District Court for the Southern District of New York. Shea v. Reno, 930 F. Supp. 916 (S.D.N.Y. 1996). Although this court also found the CDA to place unconstitutional restrictions on speech, this case is not addressed in this paper because the judges did not cite a legal metaphor for the Internet in deciding that case.

[85] 492 U.S. 115 (1989).

[86] 929 F. Supp. 824, 874 (E.D.Pa. 1996).

[87] Id. at 875 (quoting Bolger v. Youngs Drug Products, 463 U.S. 60 (1983)).

[88] Dalzell distinguished *Pacifica* by demonstrating from the Findings of Fact that scarcity of resources was not at issue in dealing with the Internet as it was in dealing with the broadcast spectrum in *Pacifica*. He also distinguished from *Sable* by saying the Court's holding in *Sable* addressed only one type of communication (dial-a-porn) and reached no conclusions about the fit between the First Amendment and general telephonic communications. *Id.* at 877.

SUMMARY AND CONCLUSIONS

In summary, there are many regulatory models the courts could use in order to apply existing legal precedents to communications that take place over the Internet. Each of these models, however, is greatly flawed when considered on its own. The common carrier model would absolve service providers of liability for defamatory content, but it would also prohibit them from denying service to those who have violated the behavioral norms of the online community. The cable television model would account for the fact that those who want to receive information via the Internet must take a series of affirmative steps in order to receive it. Comparing electronic mail to the United States Postal Service is an accurate comparison, but it offers no guidance for any other form of Internet communication.

Some metaphors have already been applied to cases that have come before the courts. The information distributor model proved useful in *Cubby* because the information system had no editorial control over its content, just as a bookseller has no control over the content of the books on his shelves. The information publisher model was applied in the *Prodigy* case, because Prodigy assumed editorial control and thus assumed a higher standard of liability. In *ALA v. Pataki*, the Internet was likened to a highway and thus the Commerce Clause of the Constitution was controlling. All of these cases were decided based upon the application of certain legal metaphors to one aspect of Internet communications.

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[89] Reno v. ACLU, 117 S. Ct. 2329, 2331 (1997).
[90] *Id.* at 2342.
[91] *Id.* at 2343.

Courts are beginning to merge metaphors as well. The Fourth Circuit Court of Appeals' decision in *Zeran* provided the first steps toward merging the common carrier model and the distributor model. Within this legal framework, Internet service providers would enjoy the same protections as common carriers in that they would not be held liable for the content of communication they carried. However, they would not be required to provide service to everyone, as common carriers are forced to do. In this way, service providers and online communities would retain their most effective weapon in the fight for compliance with their regulations: the ability to deny service to those who choose to disregard the standards of the community or ISP to which they subscribe.

One metaphor has already been deemed insufficient as a regulatory model. Both the three-judge panel for the U.S. District Court for the Eastern District of Pennsylvania and the U.S. Supreme Court agreed that the use of the broadcasting model as a method by which to regulate speech on the Internet was invalid. This was primarily based on the fact that the rationales behind regulation of broadcasting, spectrum scarcity and pervasiveness, are not present when dealing with the Internet.

In examining these cases individually, it appears the metaphor chosen in each instance was one that was least restrictive of the users' First Amendment right to free speech. Problems will arise, however, if courts attempt to apply broad, sweeping metaphors to all aspects of the Internet without regard for the technical capabilities of each aspect of digital electronic communications. Just as courts recognize the difference between distribution of George Carlin's "seven dirty words" via the public airwaves and via the United States Postal Service, so should they recognize the difference between a website discussing indecent material and an electronic mail message discussing the same topic. While they are being transmitted via two aspects of the same medium, these aspects are just as fundamentally and technically different as radio and print communication - a difference courts should keep at the forefront of their decision-making processes when asked to decide cases in this fledgling field of communication.

In order to establish a binding legal precedent, a general understanding of the Internet should be necessary. The explicit statements of findings of fact that exist in *ACLU v. Reno* and *Shea v. Reno* are already being used among courts as common frames of reference in order to define terminology relating to the Internet.[92] Judge Buckwalter said in his opinion in *ACLU v. Reno* that "(i)n statutes that break into relatively new areas, such as this one, the need for definition of terms is greater, because even commonly understood terms may have different connotations or parameters in this context."[93]

Until the Internet is better understood and more precisely defined, however, applying any sort of sweeping legal metaphor or regulatory model will be next to impossible and highly impractical. It would be easier, and preferable, to take the cautious route and consider each case as a separate entity, assembling a body of case law and analogies based on the facts of that specific set of circumstances. Decisions should also account for the technical capacities and limitations of the aspect of Internet communications in question. This is what the courts have been doing, and the results have not chilled the speech found on the Internet. By doing so, it may take longer to assemble a coherent body of law concerning cyberspace, but the result will be a more precise definition of these new technologies and a new medium of communication whose First Amendment rights have not been restricted prematurely.

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[92] 930 F. Supp. 916 (S.D.N.Y. 1996).
[93] 929 F. Supp. 824, 865 (E.D. Pa. 1996).

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Merging Law and Ethics: Discourse Legal Theory and Freedom of Expression

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Merging Law and Ethics: Discourse Legal Theory and Freedom of Expression

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I. Introduction: Law and Democracy

In 1988, German political theorist Jürgen Habermas ended his *Tanner Lecture on Human Values* with a puzzling statement: "There can be no autonomous law without the realization of democracy."[1] What could Habermas have meant by this statement? At best, it might be argued that he is stating the self-evident; at worst it could be said that he's being naive. If we read Habermas to simply mean that the realization of democracy is the way that the judiciary secures its independence (citizens granting power to judges), it is hardly a novel statement. Political theorists from John Stuart Mill to Joseph Schumpeter have explored the idea of the legitimacy of representative democracy.[2] And in 1946, Supreme Court Justice Felix Frankfurter came to much the same conclusion, arguing that a democratic free press was a critical element of insuring the legitimacy of the judiciary.[3]

If we break from liberalism, we could interpret Habermas as issuing a call for a more participatory form of democracy where civil society directly decides what is law. A

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[1] JURGEN HABERMAS, THE TANNER LECTURES ON HUMAN VALUES, *Lecture Two: On The Idea of the Rule of Law*, at 279 (1988).

[2] See JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT (1861) and JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY (1947).

[3] Justice Frankfurter wrote: "A free press is not to be preferred to an independent judiciary, nor an independent judiciary to a free press. Neither has primacy over the other; both are indispensable to a free society. The freedom of the press in itself presupposes an independent judiciary through which that freedom may, if necessary, be vindicated. And one of the potent means for assuring judges their independence is a free press." Pennekamp v. Florida, 66 S. Ct. 1029, at 1041-1042 (1946) (Frankfurter, J., concurring).

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critic might respond to this Rousseauian interpretation by suggesting that Habermas is being hopelessly romantic; modern society cannot efficiently function in that form.

I would suggest, however, that there is a third reading we can take from Habermas' short statement on the link between law and democracy,[4] an observation that is too often lost in our study of law in the United States in general and in the study of freedom of expression in particular. There is an inherent link between democratic life, and the ethical values that govern it, and the role law plays in obtaining that life. As Habermas' most recent work makes clear, he was not making simplistic nor romantic claims in 1988, but urging us to understand the political implications of law as a tool of democracy. Habermas does not argue for a separation of law and politics, but rather a more blatantly political law that is guided by the ethical goal of improving discourse in society. It is only through the promotion of discourse, Habermas would argue, that a more just society can be achieved.

In a recent article, Clay Calvert has attempted to show how the role of a free press might be changed, at least in the eyes of the judiciary, if it follows the lead of the public journalism movement. While rarely making the connection, the public journalism movement is heavily indebted to discourse theories of society and the law.[5] And while Calvert makes no mention of discourse theory, he puts forward the argument that discourse-centered practice could change the judiciary's understanding of the role the press plays in society. Calvert deals with public journalism's influence on the institutional press, but not how such movements might influence citizens and the broader area of freedom of expression.[6]

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[4] Habermas has made much the same suggestion. He sees his project as a "dialectic between liberalism and radical democracy." As he writes, "The dispute has to do with how one can reconcile equality with liberty, unity with variety, or the right of the majority with the right of the minority." HABERMAS, BETWEEN FACTS AND NORMS, 472 (1996).

[5] See David S. Allen, *Communicative Ethics and Public Journalism: A Movement in Search of an Ethical Standard*, unpublished paper presented to Speech Communication Association (1995).

The purpose of this paper is to provide a sketch of what is meant by discourse legal theory and then argue for how it might change our understanding of freedom of expression by providing the link between law and ethics. Three thinkers pivotal to discourse legal theory will be examined. Section II will highlight Frank Michelman's work on the judiciary's role in creating civic republicanism. Section III will review Cass Sunstein's argument for a more deliberative democracy that recognizes and accepts government's responsibility for aiding in that deliberation. And in Section IV, Habermas' legal theory, which builds on the ideas of Michelman and Sunstein, will be explained. Section IV will also link Habermas' legal theory with his broader concepts of discourse ethics and the ideal speech situation, both of which are central to his legal theory.

In an attempt to take the discussion from the abstract to the practical, Section V will attempt to demonstrate how a court, following the values of discourse legal theory, might apply these ideas. In the case *Hurley and South Boston Allied War Veterans Council v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,[7] a unanimous U.S. Supreme Court ruled that the state of Massachusetts cannot force private citizens who organize parades to include groups imparting messages with which the organizers disagree. It will be suggested that discourse legal theory demonstrates how the Court overvalued the private value of speech and undervalued its public, discursive value. In the end, it will be argued that discourse legal theory carves out a more protective standard for disempowered groups, especially in events that use forums such as public streets, providing a connection between law and ethics.

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[6] Clay Calvert, *Clashing Conceptions of Press Duties: Public Journalists and the Courts*, 2 Comm. Law & Pol. 441 (1997).

[7] Hurley and South Boston Allied War Veterans Council v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995).

II. Law as Civic Republicanism

It is relatively easy to construct an argument that mainstream legal thought in the United States is built upon a foundation that separates—or at least denies the existence of a connection between—law and ethics. This does not mean the people who practice law and engage in the practice of lawmaking are unethical. While questions about ethical professional practice are undoubtedly important, ethics as used here does not refer to the narrow, applied-ethics formulation. Ethics, as used in this paper, refers to the larger concern of normative ethics—the idea of how we ought to live our lives, how society ought to be organized, and what practices might aid in the realization of that goal.

The development of American legal education can be viewed as an attempt to make the study of law more scientific and to separate the question of "ought" from the question of "is." Morton Horowitz has noted that the rise of legal formalism was an attempt to separate "politics from law, subjectivity from objectivity and layman's reasoning from professional reasoning."[8] Critics of law as a formal practice, from the legal realists[9] to today's critical legal tradition,[10] have viewed such claims with skepticism.

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[8] Morton J. Horwitz, *The Rise of Legal Formalism*, 19 Am. J. L. H. 255 (1975).

[9] See WILFRID E. RUMPLE JR., AMERICAN LEGAL REALISM: SKEPTICISM, REFORM, AND THE JUDICIAL PROCESS (1968).

Legal historian Lawrence Friedman has written that as law-as-science separates itself from society, it becomes "a geology without rocks, and astronomy without stars."[11]

For some, the claim to scientific certainty becomes an authoritarian attempt to eliminate challenges to the status quo. Rather than separating ethics from law, for example, science masks the normative assumptions that are inherent in the law itself. As Donald McCloskey puts it in his study of the rhetoric of economics, which is easily transferable to the law:

> The experts claim that their stories are "positive, not normative," "is" instead of "ought," the way things are as against how they should be. The claim is at the center of modernism. But stories carry an ethical burden. Concealing the ethical burden under a cloak of science is the master move of expertise, the secret ingredient of the snake oil.[12]

Frank Michelman attempts to overcome the authoritarian nature of the law by grounding law in a "dialogic conception of politics" central to civic republican thought.[13] Michelman seeks to bring "law back to politics and politics back to law."[14] By politics, Michelman clearly seeks to impart on the law ethical standards. In his eyes, a dialogic conception of politics idealizes politics first of all as a "normative activity" and secondly as

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[10] See MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987).

[11] LAWRENCE FRIEDMAN, HISTORY OF AMERICAN LAW, at 617 (1985).

[12] DONALD N. MCCLOSKEY, IF YOU'RE SO SMART: THE NARRATIVE OF ECONOMIC EXPERTISE, at 135 (1990). A similar argument is made by JAMES BOYD WHITE, JUSTICE AS TRANSLATION (1990).

[13] Frank Michelman, *Bringing the Law to Life: A Plea for Disenchantment*, 74 Cornell L. Rev., at 257 (1989).

[14] *Id.*, at 269.

a pragmatic activity. Political argument, then, is "a kind of ethical argument that is culturally and historically situated and conditioned but that also proceeds without foundations."[15]

This idea of politics becomes important to understanding the making and interpretation of law because law has sought to separate itself from politics. Politics has come to carry a negative connotation, ignoring the idea that politics is a discourse about how we ought to live our lives. Building on political theorists such as Benjamin Barber[16] and Hannah Arendt,[17] Michelman sees political engagement as "a positive human good because the self is understood as partially constituted by, or as coming to itself through, such engagement."[18]

What then are the consequences for law in adopting a form of civic republicanism? For Michelman, one of the preconditions of a dialogic form of law is legal indeterminacy, an idea central to the critique offered by critical legal scholars. By legal indeterminacy, critics mean "the degree to which we would find it impossible to match up prevailing practices . . . with particular social conditions."[19] While this indeterminacy is often used by critics to undermine existing legal standards and practices,[20] Michelman, in civic-

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[15] *Id.*, at 258.

[16] See BENJAMIN BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE (1984).

[17] See HANNAH ARENDT, THE HUMAN CONDITION (1958).

[18] Frank Michelman, *Law's Republic*, 97 Yale L. J. 1503 (1988).

[19] KELMAN, *supra* note 10, at 245.

[20] *Id.*, at 242.

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republican fashion puts a positive spin on the issue of indeterminacy. As he writes, "Legal indeterminacy in that sense is the precondition of the dialogic, critical-transformative dimension of our legal practice."[21] Legal indeterminacy does not lead to nihilism but rather presents a way for outside voices to enter the discussion. It is difficult to establish the predictive portion of law because we cannot predict who will join the discussion and what they might have to say. As Michelman notes, by constantly reaching to include "the other" in discourses, we sacrifice predictability.[22]

Michelman has tried to demonstrate his ideas through a critique of the Supreme Court's decision in *Buckley v. Valeo*,[23] where the Court used the First Amendment to overturn Congressional regulation of political campaign contributions. Michelman has argued that rather than rejecting the legislation based on constitutional principles, the Court should have more appropriately engaged in a discourse about the value of such legislation. As Michelman notes, "Automatic invalidation and refusal of inquiry is flight from judicial responsibility."[24] Instead, Michelman calls on the Court to engage in a more searching inquiry about whether limiting some people's political speech might be acceptable for the greater good. Dialogue, Michelman states, "could thus serve as a point of mediation and *rapprochement* between politics and law."[25]

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[21] Michelman, *supra* note 18, at 1529.

[22] *Id.*

[23] 424 U.S. 1 (1976) (per curiam).

[24] Michelman, *supra* note 13, at 267.

[25] *Id.*, at 267 (emphasis in original).

III. Sunstein and Deliberative Democracy

Michelman is not, of course, alone in seeing discourse as central to the promotion of a just society. The importance of deliberation to democracy has been explored by a number of scholars. There is, however, little agreement on what a deliberative form of democracy would look like. Joseph Bessette has argued that deliberative democracy is more than rule by elites or by compromises among special interest advocates. Bessette writes that the framers of the Constitution intended to achieve majoritarian rules through representatives and the discussion in which those representative engaged. Bessette, following the writings of James Madison, suggests that the framers believed that public opinion refines and enlarges, not displaces, the personal views of representatives. "What results," Bessette writes, "can be called 'the public voice,' although it is not pronounced by the people directly."[26]

Cass Sunstein makes much the same argument, arguing that "Madisonian republicanism" is "a hybrid conception of representation, in which legislators were neither to respond blindly to constituent pressures nor to undertake their deliberations in a vacuum."[27] In Sunstein's eyes, the American constitutional system intended to create a deliberative democracy, combining "popular accountability with a belief in deliberation among representatives and the citizenry at large."[28] Sunstein backs a heterogeneous republic in which reflection is likely to arrive at general truths, roughly akin to William James' pragmatic notion of truth[29] For Sunstein, the idea of deliberative democracy lies at the heart of the freedoms of speech and press

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[26] Joseph M. Bessette, *Deliberative Democracy: The Majority Principle in Republican Government*, in HOW DEMOCRATIC IS THE CONSTITUTION? (R.A. Goldwin and W.A.Schambra eds. 1980), at 105.

[27] Cass R. Sunstein, *Free Speech Now*, 59 U. Chi. L. Rev. 47 (1992).

[28] *Id.*, at 313.

A A Government Role in Promoting Speech

Using deliberation as a core ideal, Sunstein struggles to find the proper way to promote and achieve that discourse To do so, Sunstein claims, "it will be necessary to abandon, or at least qualify, the basic principles that have dominated judicial and academic thinking about speech in the last generation"[30]

Rather than denying or limiting government's role in a system of freedom of expression, common to traditional liberal interpretations, Sunstein argues for an active governmental role Building on arguments first put forward by New Deal reformers in relation to property rights, Sunstein argues that freedom of expression cannot be "prepolitical."[31] In that way, freedom of expression is a construct of the state, much as property rights As Sunstein writes

> The fact that markets are a creature of law meant not that they were impermissible, but that they would be assessed in terms of what they did on behalf of the human beings subject to them Markets would not be identified with liberty in an *a priori* way, they would have to be evaluated through an examination of whether they served liberty or not[32]

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[29] *Id.*

[30] *Id.*, at 263

[31] *Id.*, at 264

[32] *Id.*, at 266

Sunstein is putting forward less an attack on the idea of markets[33] than trying to suggest that markets are a creation of government and therefore subject to review by government. Therefore, in Sunstein's opinion, shopping center owners are allowed to exclude protesters only because the government has given them the power to do so, broadcast owners can exclude speakers because the government has provided them with exclusive ownership rights.[34]

Sunstein believes that a New Deal-type reinterpretation of property opens the door for government playing a more active role in the promotion of freedom of expression.

B. A New Deal for Public Forums

A reevaluation of the idea of property rights leads Sunstein to challenge many traditional ideas about freedom of expression. Sharp distinctions between content-neutral laws and content-based laws would need to be reevaluated. Sunstein sees two problems with the distinction: 1) "many content-neutral laws have content-differential effects," primarily because they "operate against a backdrop that is not prepolitical or just,"[35] and 2) content-based restrictions may be needed as a corrective to an unjust status quo.[36] For Sunstein, content-neutral laws are not prepolitical, but rather are inevitably political in the sense that they tend to reinforce the status quo rather than giving voice to oppositional or disempowered groups in society.

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[33] For an excellent critique of the idea of markets and property, especially the role it plays in helping to determine broadcast policy, see THOMAS STREETER, SELLING THE AIR: A CRITIQUE OF THE POLICY OF COMMERICAL BROADCASTING IN THE UNITED STATES (1996) at 163-216.

[34] Sunstein, *supra* note 27, at 272.

[35] *Id.*, at 296.

[36] *Id.*, at 297.

Building on that idea, Sunstein proposes that public forum cases should not revolve around the issue of property rights. Rather, the central question is "whether the government has sufficiently strong and neutral reasons for foreclosing access to the property."[37]

C. Deliberation and the Constitution

In Sunstein's view, traditional legal interpretations of the First Amendment are problematic because they at once protect more than they should (speech that serves few goals or causes serious harm) and they protect less than they should (speech that produces "a deliberative democracy among political equals").[38]

The key element that the First Amendment seeks to protect, in the view of Sunstein, is deliberation. Sunstein seeks to protect first and foremost "political speech," a position that would seem to place him close to the First Amendment theory of Alexander Meiklejohn.[39] However, Sunstein offers a more narrow view of political speech: "speech (is) political when it is both intended and received as a contribution to public deliberation about some issue."[40] Sunstein's definition of high-value speech then has two components: 1) speech that contributes to public deliberation about issues and 2) expression where the speaker demonstrates some intentionality toward achieving deliberative goals and where "some" listeners and readers "see the substantive content."[41] For Sunstein, "if no one sees the political content, it is hard to understand why the speech should so qualify" for protection.[42]

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[37] *Id.*, at 295.

[38] *Id.*, at 315.

[39] Meiklejohn attempted to design protections for speech that bears on issues important to self-governance. As Meiklejohn wrote, "What is essential is not that everyone shall speak, but that everything worth saying shall be said." MEIKLEJOHN, POLITICAL FREEDOM (1960) at 26. Meiklejohn has been seen as not providing enough protection for unpopular free speech and in being unrealistic in his assessment of people's interest in public policy. Meiklejohn was hindered by his inability to provide a distinction between the public and private sphere. For a discussion of this point, see MARTIN EDELMAN, DEMOCRATIC THEORIES AND THE CONSTITUTION (1984) at 211-214.

[40] Sunstein, *supra* note 27, at 304.

While Sunstein seeks to protect speech that is central to political deliberation, he does have a broad definition of what he means by political. He admits that hard lines will have to be drawn between what qualifies and what doesn't qualify for protection under the label political. Still, he does not see political as pertaining only to "political tracts, but all art and literature that has the characteristics of social commentary—which is to say, much art and literature."[43] He does not advocate, however, that all speech is political. The question is "whether the speech is a contribution to social deliberation, not whether it has political effects or sources."[44] He offers some suggestions:

> [T]here is a distinction between a misogynist tract, which is entitled to full protection, and pornographic movies, some of which are in essence masturbatory aids and not entitled to such protection. Personal, face-to-face racial harassment by an employer of an employee is not entitled to full protection, while a racist speech to a crowd is. There is a distinction between a racial epithet and a tract in favor of white supremacy. An essay about the value of unregulated markets in oil

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[41] *Id.* Sunstein does not advocate holding hearings on questions of "subjective motivation." Rather, he believes that this issue can be resolved on the "nature of speech."

[42] *Id.*

[43] *Id.*, at 308.

[44] *Id.*, at 309.

> production should be treated quite differently from an advertisement for Texaco—even if an oil company writes and publishes both.[45]

While space limitations do not allow an in-depth examination of his ideas, for the purposes of this paper, Sunstein offers an explicit link between democracy and the idea of freedom of expression. In fact, freedom of expression cannot be justified by itself, but rather it is only justified through its link to creating a deliberating democratic society.

IV. Habermas' Discourse Theory of Law

Habermas builds on ideas put forward by Michelman and Sunstein in an attempt to construct what he terms a theory of law built on discursive principles. His ideas, brought together in a 1996 book,[46] represent an attempt to locate law in the broader project of critical social theory, which he has termed communicative action. His theory and ideas are complex to say the least. This section will attempt to provide a brief overview of his theory of communicative action, the centrality of the idea of discourse ethics to his project, and end by locating those ideas within his legal theory.

A. The System-Lifeworld Distinction

Whereas Habermas' earlier work made no distinction between society and the systems that functionally organized it, the theory of communicative action provides a more complex structural model. Essentially, Habermas divides the modern welfare state into two parts: system and lifeworld.[47]

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[45] *Id.*

[46] HABERMAS, *supra* note 4.

[47] The distinction was first introduced in HABERMAS, LEGITIMATION CRISIS 4 (1975) at 4.

The lifeworld is where communicative action takes place. It is in the lifeworld where tradition, culture, and language are "intersubjectively shared" and communication is made possible.[48] As James Bohman describes it, the lifeworld "is the stock of consensual, background knowledge which makes processes of further mutual understanding possible."[49] The public sphere, where private people come together to form something we can call public opinion,[50] is part of the lifeworld. While action, understanding, and meaning are embedded in the lifeworld, they are functionally organized in the system. It is in the system, the area of strategic action controlled by the market and the bureaucratic state, that the material needs of the lifeworld are maintained.[51] Essentially, Habermas argues that the system is organized through money or power while the lifeworld values communication through language. The ultimate goal of the lifeworld is understanding, attempting to ascertain what other members of society are trying to communicate. As Habermas notes, communicative action serves the function of reaching understanding,

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[48] HABERMAS, THE THEORY OF COMMUNICATIVE ACTION: REASON AND RATIONALIZATION OF SOCIETY (1981) at 12-13.

[49] James Bohman, *"System" and "lifeworld": Habermas and the problem of holism*, 15 Phil. & Soc. Crit., at 387 (1989).

[50] See Jürgen Habermas, *The Public Sphere*, JÜRGEN HABERMAS ON SOCIETY AND POLITICS: A READER (Steven Seidman ed., 1989). It is important to note that Habermas sees a qualitative difference between today's common usage of the term "public opinion" and his idea of public opinion. As he writes, "Public opinion is not representative in the statistical sense. It is not an aggregate of individually gathered, privately expressed opinion held by isolated persons. . . . Political opinion polls provide a certain reflection of 'public opinion' only if they have been preceded by a focused public debate and a corresponding opinion-formation in a mobilized public sphere." HABERMAS, *supra* note 4, at 362. For Habermas, the public sphere is the "social space generated in communicative action." As he writes, the public sphere is a "network for communicating information and points of view . . . ; the streams of communication are, in the process, filtered and synthesized in such a way that they coalesce into bundles of topically specified *public* opinions." *Id.*, at 360 (emphasis in original).

[51] HABERMAS, THE THEORY OF COMMUNICATIVE ACTION: LIFEWORLD AND SYSTEM (1987) at 153-155.

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coordinating action, and socializing actors.[52] Its basic goal is the process of reaching agreement.[53] The goal of the system, however, is vastly different. Its goal is not communicative action, but rather strategic action. The end result is not necessarily understanding, but rather success.

Following Max Weber, Habermas sees the consequences of modernity—bureaucratization, professionalism, the loss of meaning—as damaging to society as a whole. The result of modernity, for Habermas, has been the rationalization of the lifeworld; that is, "the lifeworld is both uncoupled from and made dependent upon increasingly complex, formally organized domains of action, like the economy and state administration."[54] The lifeworld, in effect, is no longer necessary for coordinating action in society. Instead, the organizing function has been taken over by the system and the knowledge to coordinate society has been transformed from practical knowledge that can be comprehended by the public to technical knowledge that can be understood only by experts.[55] In effect, the "technicizing of the lifeworld" robs citizens "of the meaning of their own actions."[56]

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[52] *Id.*, at 63.

[53] HABERMAS, *supra* note 48, at 286.

[54] HABERMAS, *supra* note 51, at 305.

[55] Thomas Streeter has made a similar argument in terms of the discussion of media policy issues in the United States. See STREETER, *supra* note 33, at 113-162.

[56] HABERMAS, *supra* note 51, at 302.

The result for Habermas "is the monetarization and bureaucratization of everyday practices both in the private and public spheres."[57] Bohman attempts to provide specific examples of this phenomenon:

> (M)arkets and the defense bureaucracy have come to determine, more and more, the questions and methods of scientific research; universities are increasingly becoming integrated into the occupational system; and finally, the insurance industry is increasingly dictating the nature of medical practice.[58]

B. The Ideal Speech Situation and Discourse Ethics

Habermas' belief in the ability of people to reach understanding through communication is at the heart of two ideas that remain central to Habermas' project: the ideal speech situation and discourse ethics.

The ideal speech situation is for Habermas something that is more or less taken for granted in the domain of discourse. As Thomas McCarthy explains, the ideal speech situation is a goal that speakers seldom achieve, but an assumption that is made "whenever we enter into discourse with the intention of arriving at rational agreement about truth claims."[59] The ideal speech situation can be summarized in three basic rules:

1. Rule of Participation: Anyone capable of engaging in conversation is allowed to participate.
2. Rule of Equality of Communicative Opportunity: Each person can participate under the following:

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[57] *Id.*, at 325.

[58] Bohman, *supra* note 49, at 381-382.

[59] THOMAS MCCARTHY, THE CRITICAL THEORY OF JÜRGEN HABERMAS (1988) at 30.

a. All proposals can be questioned.

b. New proposals can be introduced.

c. Attitudes, sincere beliefs, wishes and needs can be expressed.

3. Rules Against Compulsion. Compulsion arising from either inside or outside the discourse is not allowed to prevent the right guaranteed in nos. 1 and 2 above.[60]

The ideal speech situation is both a goal for which citizens ought to aim as well as a critical standard against which consensus can be judged. Habermas, in that regard, prefers to "speak of an anticipation of an ideal speech situation."[61]

Vital to Habermas' critical social theory is the discourse ethics he puts forward, for it is here that the moral principles are developed that serve as a guide for interpreters and actors engaged in practical discourse. Pared to three general principles, Habermas' discourse ethics can be summarized as follows: 1) "only those norms may claim to be valid that could meet with the consent of all concerned, in their role as participants in practical discourse," 2) "for a norm to be valid, the consequences and side-effects of its general observances for the satisfaction of each person's particular interests must be freely accepted by all," and 3) "an ethics is termed 'universalistic' when it alleges that a moral principle, far from reflecting the institutions of a particular culture or epoch, is valid universally."[62]

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[60] This formulation is the work of Lawrence Boyd Solum, *Freedom of Communication Action: A Theory of the First Amendment Freedom of Speech*, 83 Northwestern U. L. Rev. at 96-97 (1989).

[61] As quoted in McCarthy, *supra* note 59, at 310.

Underlying Habermas' discourse ethics is a distinction between generalizable and particular interests. In short, particular interests are not intersubjectively reconcilable, while generalizable interests can be communicatively shared and reflect a possible consensus about what all could want.[63] The value of particularity to practical discourse is evident, as Habermas writes:

> [I]f the actors do not bring with them, and into their discourse, their needs and wants, their traditions, memberships, and so forth, practical discourse would at once be robbed of all content.[64]

Habermas recognizes that his stated goal of hoping to provide room for particularistic interests while providing universal principles is one of the most difficult parts of his project. As he notes, the goal is to show that a "moral principle is not just a reflection of the prejudices of the adult, white, well-educated, western male of today."[65]

Habermas' discourse ethics is not without criticism, even from those sympathetic to his agenda. Seyla Benhabib has argued that Habermas needlessly places too much emphasis on the goal of universalizability. She argues that he can't overcome the twin criticisms of universal standards: triviality or inconsistency.[66] Instead, Benhabib suggests a slight variation on Habermas' work. Through universal standards, Habermas hopes society will be able to achieve consensus. Benhabib argues, however, the important insight of discourse ethics is not that a consensus can be guaranteed, but rather that consensus is obtained through a fair process. By switching the emphasis from consensus to process, Benhabib hopes to allow communicative ethics to focus on the creation of a way of life.[67]

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[62] Habermas, *Morality and Ethical Life: Does Hegel's Critique of Kant Apply to Discourse Ethics?* 83 Northwestern U. L. Rev. at 40 (1989).

[63] Lorenzo C. Simpson, *On Habermas and Particularity: Is There Room for Race and Gender on the Glassy Plains of Ideal Discourse*, 6 Praxis Int'l at 330 (1986).

[64] Habermas, *A Reply to My Critics*, in HABERMAS: CRITICAL DEBATES (John B. Thompson and David Held eds. 1982) at 255.

[65] Habermas, *supra* note 62, at 40.

C. Discourse Legal Theory and Civil Rights

Building on such ideas as the public sphere, the ideal speech situation, and discourse ethics, Habermas' discourse legal theory is an attempt to reconcile the ideas of democracy and individual autonomy.[68] Habermas hopes to find a way to allow individuals to bring their particular interests into the discussion about how society ought to be organized. Laws, for Habermas, are vital for this process. As he writes, "By their very structure, laws are defined by the question of which norms citizens want to adopt for regulating their common life."[69] In this way, law and morality are intertwined in the law.

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[66] Seyla Benhabib, *Afterword: Communicative Ethics and Current Controversies in Practical Philosophy*, in THE COMMUNICATIVE ETHICS CONTROVERSY (Seyla Benhabib and Fred Dallmayr eds., 1990) at 341.

[67] *Id.*, at 346.

[68] See Kenneth Baynes, *Democracy and the Rechtsstaat: Habermas's Faktizitat und Geltung*, in THE CAMBRIDGE COMPANION TO HABERMAS (Stephen K. White ed., 1995) at 210.

[69] HABERMAS, *supra* note 4, at 282.

> The law of a concrete legal community must, if it is to be legitimate, at least be compatible with moral standards that claim universal validity beyond the legal community.[70]

It is important to understand that Habermas does not see universal rights as a set of natural, preexisting rights. And he differs from communitarians, such as Michelman, who allow *a priori* agreement to serve as ethical standards. Rather, politically autonomous individuals constitute rights through discourse.[71]

In his attempt to articulate his discursive idea of law, Habermas puts forward five basic rights. They are as follows:

1. Basic rights that result from the politically autonomous elaboration of the *right to the greatest possible measure of equal individual liberties*.
2. Basic rights that result from the politically autonomous elaboration of the *status of a member* in a voluntary association of consociates under law.
3. Basic rights that result immediately from the *actionability* of rights and from the politically autonomous elaboration of individual *legal protection*.
4. Basic rights to equal opportunities to participate in processes of opinion-and-will-formation in which citizens exercise their *political autonomy* and through which they generate legitimate law.
5. Basic rights to the provision of living conditions that are socially, technologically, and ecologically safeguarded, insofar as the current

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[70] *Id.*

[71] Baynes, *supra* note 68, at 211-212.

> circumstances make this necessary if citizens are to have equal opportunities to utilize the civil rights listed in (1) through (4).[72]

The first three rights are Habermas' attempt to define the status of individuals. In that regard, they are understood as "liberal rights against the state, because they only regulate the relationships among freely associated citizens prior to any legally organized state authority from whose encroachments citizens would have to protect themselves."[73] The fourth right is Habermas' attempt to begin allowing citizens to become the authors of "their legal order." It "enables citizens to change and expand" various rights and duties.[74] The fifth and final right Habermas sees as being the logical outcome of the previous four, providing discursive opportunities for citizens to achieve the first four rights.[75]

Habermas' goal in building his discourse theory is to identify a system of rights that "consists neither in spontaneous market forces nor in the deliberate measures of the welfare state."[76] Rather, it is a set of rights that exists "in the currents of communication and public opinion" that is central to civil society.[77] Beyond that, however, Habermas also seeks to find a mediating space between liberal and communitarian thought. As Habermas writes, the paradigm of law that he puts forward does not favor a "particular vision of the good life," but rather "states the necessary conditions under which legal subjects in their role of enfranchised citizens can reach an understanding with one another."[78] In the end, Habermas hopes to identify "structural similarities" between law and communicative action and a "conceptual and internal relation" between law and democracy.[79]

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[72] HABERMAS, *supra* note 4, at 122-123 (emphasis in original).

[73] *Id.*, at 122.

[74] *Id.*, at 123.

[75] *Id.*

[76] *Id.*, at 442.

[77] *Id.*

E. Media and Speech Implications

Habermas has claimed that the only force that can serve as a check on the growth of illegitimate power is "a suspicious, mobile, alert, and informed public sphere . . . from which legitimate law can arise."[80] Central to this is how communicative action is converted into democratic procedures,[81] which carries with it significant implications for how a discourse theory of law views questions of freedom of speech and media regulation.

In order to achieve the goal of expanded citizen participation in public life, Habermas advocates stronger constitutional controls on the power of the mass media in society. While American media today are free to forge relationships with powerful members of society, Habermas apparently would support some limits on that freedom.

> The mass media must be kept free from the pressure of political and other functional elites; they must be capable of raising and maintaining the discursive level of public opinion-critical audiences.[82]

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[78] *Id.*, at 445.

[79] *Id.*, at 449.

[80] *Id.*, at 442.

[81] It should be noted that Habermas is not advocating here a form of direct democracy. As he writes, "[T]he communication structures of the public sphere *relieve* the public *of the burden of decision making*; . . . the postponed decisions are reserved for the institutionalized political process." *Id.*, at 362 (emphasis in original).

[82] *Id.*, at 442.

In that regard, Habermas views the mass media as similar to the judiciary,[83] serving as a tutor to the public sphere.[84] The media, in Habermas' eyes, ought to understand themselves as being "mandatary of an enlightened public" and "presuppose, demand, and reinforce" a capacity for criticism.[85] Based on this idea, political and social actors, including the mass media, would only be allowed to use the public sphere "insofar as they make convincing contributions to the solution of problems that have been perceived by the public or have been put on the public agenda with the public's consent.[86]

Clearly, Habermas sees the media as being entitled to constitutional protections only when fulfilling a discursive mission. In fact, the media's mission should be to promote discourse, to allow voices to be heard that have previously been silenced by the "administrative and social power."[87]

In addition, Habermas sees a close link between the freedoms of assembly, association, and expression. The ability to express oneself is vital, but not greater than the "right of parties to collaborate in the political will-formation of the people."[88] For Habermas, the value of expression is not simply what is said, but the fact that citizens are engaging in discourse. In choosing to express themselves, citizens reinforce and actualize the value of a political public sphere.[89] As Habermas writes:

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[83] *Id.*, at 378.

[84] *Id.*, at 280. On the role of the courts, Habermas writes: "The court may not assume the role of a regent who takes the gaze of a robust legal public sphere—a citizenry that has grown to become a 'community of constitutional interpreters'—the constitutional court can at best play the role of a tutor."

[85] *Id.*, at 378.

[86] *Id.*, at 379.

[87] *Id.*

[88] *Id.*, at 368.

> [A]ctors who support the public sphere are distinguished by the dual orientation of their political engagement: with their programs, they directly influence the political system, but at the same time they are also reflexively concerned with revitalizing and enlarging civil society and the public sphere as well as with confirming their own identities and capacities to act.[90]

V. Using Discourse Legal Theory: The *Hurley* Case

As presented by its advocates, discourse legal theory is more than just an abstract legal theory. It represents an attempt to merge legal and ethical thought, bringing with it an idea about how democratic society ought to be organized. It sees law as an integral and vital part of achieving truly democratic life. As can be seen in Habermas' articulation of discourse theory, freedom of expression means more than the liberal idea of individual expression. Habermas seeks to grant individuals increased access to participate in democratic activities.

Still, unlike Michelman and Sunstein, Habermas' ideas remain relatively abstract. In his work, Habermas does not make any attempt to apply his ideas to case law in the United States. The following will use discourse legal theory, building on ideas from Michelman, Sunstein, and Habermas, to critique the U.S. Supreme Court's decision in *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.*

A. Background

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[89] *Id.*, at 369.

[90] *Id.*, at 370.

The city of Boston has long celebrated St. Patrick's Day with a parade. The city has sponsored celebrations, including parades, since at least 1776, with some being noted as early as 1737. Formal sponsorship by the city of the celebration ended in 1947 when Mayor James Michael Curley granted authority to sponsor a parade to the South Boston Allied War Veterans Council, a collection of various veterans groups. Since that time, the group has annually applied for and received a permit to sponsor a parade through Boston on St. Patrick's Day.[91] Up to and including 1992, the city allowed the group to use the city's official seal, provided printing services, and other direct funding of the parade.

In 1992, a group of gay, lesbian, and bisexuals of Irish descent formed with the expressed purpose of marching in the parade. Known as GLIB, the group hoped to, according to the Court, "express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals" and to demonstrate their solidarity with other marchers in the parade.[92] Organizers denied GLIB permission to march in the 1992 parade, but a state court ordered the Council to grant the marchers access. The Court noted that GLIB marched "uneventfully" in the parade, which included 10,000 participants and 750,000 spectators.[93]

The following year, GLIB once again sought permission to march and once again was denied permission. GLIB filed suit, and a state trial court ruled that the Council must provide the marchers with access. The trial court based its decision on the Massachusetts public accommodation law, which prohibits "any distinction, discrimination or restriction on account of . . . sexual orientation . . . relative to the admission of any person to, or treatment in any place of public accommodation, resort or amusement."[94] The trial court noted that the Council did not have any written criteria for allowing access, nor did it routinely probe the messages or views of other applicants. In the end, the trial court ruled that the parade was not a "constitutionally protected right of expressive association," but rather an "open recreational event" subject to the public accommodation law.[95]

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[91] Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995), at 560-561. The Court notes that no other applicant has ever applied for a permit.

[92] *Id.*, at 561.

[93] *Id.*

The trial court's decision was affirmed by the Supreme Judicial Court of Massachusetts, and the case was appealed to the U.S. Supreme Court. A unanimous Court, led by Justice Souter's opinion, overturned the decision, preferring to recognize the expressive content of the parade and, in particular, the ability of the organizer's to control content. The state, the Court ruled, violated the First Amendment when it allowed speech to become a public accommodation.

B. The Private-Public Dilemma and the Meaning of Expression

A large portion of Justice Souter's decision for the majority rested on the uneasy relationship between private speech and its public nature. For Justice Souter and the Court, "a speaker has the autonomy to choose the content of his message."[96] And since, in the words of the Court, "every participating unit affects the message conveyed by the private organizers," the ruling by the state courts interfered with the Council's First Amendment rights.

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[94] *Mass. Gen. Laws* 272.98 (1992).

[95] Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., at 563.

[96] *Id.*, at 573.

Still, Justice Souter and the Court were willing to admit that expression is not simply a case of individual autonomy. Justice Souter called parades "public dramas."[97] Parades were defined by the Court as composed of "marchers who are making some sort of collective point, not just to each other but to bystanders along the way."[98] In some way then, the Court recognized a parade's "dependence on watchers"[99] based on the fact that the public plays some role in the creation of meaning. But what role does that public play in the creation of the meaning of speech?

In the eyes of the Court, the meaning of a parade exists in the minds of its organizers, thus legitimating the need to grant the organizers First Amendment protection. As Justice Souter writes:

> Although each parade unit generally identifies itself, each is understood to contribute something to a common theme, and accordingly there is no customary practice whereby private sponsors disavow "any identity of viewpoint" between themselves and the selected participants.[100]

The organizers and who they elect to put into the parade determine meaning for the audience. As the Court notes, "the parade's overall message is distilled from the individual presentation along the way, and each unit's expression is perceived by spectators as part of the whole."[101]

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[97] *Id.*, at 568.

[98] *Id.*

[99] *Id.*

[100] *Id.*, at 576.

[101] *Id.*, at 577.

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The Court's decision is built on a traditional liberal model of the construction of meaning. Scholars from various disciplines have challenged the simplistic idea that meaning exists only in the author, or speaker. In fact, some communication scholars, such as John Fiske, would argue that meaning exists primarily in the audience.[102] Critics of that approach, such as Douglas Kellner, argue for a broader understanding of meaning. Kellner argues for a cultural study that refuses to "truncate" cultural studies and recognizes the need for understanding the role social relations and institutions play in constructing meaning for the audience.[103]

Discourse theory builds on the idea that meaning is far more complicated than the image presented by the Court. Meaning, which is a product of the lifeworld for Habermas, is produced through the free and independent exchange of ideas. In what has come to be called his linguistic turn, Habermas argues that meaning is derived from "linguistic expressions rather than from speakers' intentions."[104] Meaning is derived from the linguistic relationships that citizens find themselves in and is a product of understanding that arises from the interaction between two individuals who agree to seek that understanding. As Habermas writes:

> Speakers and hearers understand the meaning of a sentence when they know under what conditions it is true. Correspondingly, they understand the meaning of a word when they know what contribution it makes to the capacity for truth of a

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[102] JOHN FISKE, READING THE POPULAR (1989) at 98.

[103] DOUGLAS KELLNER, MEDIA & CULTURE: CULTURAL STUDIES, IDENTITY AND POLITICS BETWEEN THE MODERN AND THE POSTMODERN (1995) at 37.

[104] HABERMAS, *supra* note 48, at 275.

> sentence formed with its help. Thus . . . the meaning of a sentence is determined by its truth conditions.[105]

Meaning, guided by discourse ethics, is discursively redeemed. It does not exist solely in the author's intent, but rather in the complex linguistic relationship between speaker and hearer. The key to creating that ethical discourse is allowing all citizens who want to participate to do so.

The idea, put forward by the Court in Justice Souter's opinion, that forcing a speaker to carry a view "contrary to one's own" because it compromises the "speaker's right to autonomy over the message," runs counter to discourse principles. The Supreme Court, as does most of liberal speech theory in general, adopts an instrumental approach to freedom of expression; that is, creating avenues for individuals to achieve expressive victory.[106] The notion that ideas do battle in a free and open marketplace expresses that instrumental approach exceptionally well. Put another way, the differences can be described as follows. In liberal thought discourse serves as a means to an end,[107] while in discourse legal theory discourse is an end in and of itself. In *Hurley*, discourse theory would view GLIB's desire to seek participation in the parade as less an infringement on the Council's freedom of expression and more as a discursive act that will allow the audience to take from it what they want.

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[105] *Id.*, at 276-277.

[106] This is particularly evident in the writings of several liberal free speech advocates. In on of the earliest and most famous articulations of an instrumental free speech theory, John Milton noted that his faith in the power of truth by writing: "Let her and Falsehood grapple; who ever knew truth put to the worse, in a free and open encounter?" JOHN MILTON, AREOPAGITICA (1918), at 58. Supreme Court Justice Oliver Wendell Holmes expressed this instrumental view this way: "But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas,--that the best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out." See Abrams v. U.S., 40 S. Ct. 17, at 22 (1919) (Holmes, J., dissent).

[107] I am accepting the idea that discourse takes place in the marketplace of ideas for the sake of this argument alone. Discourse legal theory, I believe, would challenge the idea that anything resembling discourse takes place when we envision, even rhetorically, speech as taking the form of a marketplace. This is most obvious in Habermas's ideas of the public sphere. See *supra* note 50.

C. State Action and the Public Forum Issue

The concepts of state action and public forum play an important part in the Court's opinion. Justice Souter's opinion followed closely the traditional view that speakers "should be free from interference by the State based on the content" of what they say.[108] The Court viewed the state courts as declaring expression a public accommodation, thus constituting state involvement in what is and is not acceptable content for inclusion in the parade. As Justice Souter wrote:

> While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.[109]

Justice Souter failed to find any justification for making expression a category covered by the public accommodation law. He suggested that it could be argued that "forbidding acts of discrimination" might be used to rid a society of existing biases. However, Justice Souter wrote that this idea "grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression."[110] In the end, the value that comes from labeling expression a public accommodation does not offset the value of promoting individual expression.

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[108] Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995), at 579.

[109] *Id.*

Justice Souter conducted a less rigorous examination of the public forum issue. While noting the lengthy history of the parade and the diverse topics that are covered by marchers,[111] Justice Souter struggled to put individual autonomy above any right of access to a public forum. There seems little doubt that Justice Souter viewed the streets of Boston as a public forum, however, the Court instructed GLIB to obtain its own permit and hold its own parade.[112] But even Justice Souter admits that is not a viable option and recognizes that "GLIB understandably seeks to communicate its ideas as part of the existing parade, rather than staging one of its own."[113] The fact that city streets are viewed as a public forum, which the Court recognizes as a part of the "privileges, immunities, rights, and liberties of citizens," does not override the expressive rights of individuals or the state's ability to interfere with that expression.[114]

GLIB attempted to use *Turner Broadcasting System, Inc. v. FCC*[115] to justify its entry into the parade, but the Court rejected the argument. GLIB argued that gaining entry to the parade would not threaten "the core principle of speaker's autonomy" because the Council, like a cable system operator, is nothing more than a conduit as opposed to a speaker.[116] In that sense, the Council is providing the avenue through which groups express themselves, much as cable systems elect which programming to carry. The Court rejected the argument. As Justice Souter wrote:

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[110] *Id.*

[111] Justice Souter, for example, notes that banners have been carried with such slogans as "England get out of Ireland" and "Say no to drugs." *Id.* In addition, Justice Souter notes that in previous years the Council had rejected applications from the Ku Klux Klan and ROAR, an antibusing group. *Id.*, at 562.

[112] *Id.*, at 578.

[113] *Id.*, at 570.

[114] *Id.*, at 579.

[115] 512 U.S. 622 (1994), 114 S. Ct. 2445 (1994).

> [T]his metaphor is not apt here, because GLIB's participation would likely be perceived as having resulted from the Council's customary determination about a unit admitted to the parade, that its message was worthy of presentation and quite possibly of support as well.[117]

Discourse legal theory takes a broader, more affirmative view of the relationship between state action and a public forum than the Court does in *Hurley*. Building on Sunstein's New Deal interpretation of property, discourse theory would argue that the Court's decision in *Hurley* is far from separating state action from speech. Rather, it demonstrates how clearly the state is embedded in our understanding of freedom of expression—how central the state is to the existence of that freedom as we understand it. In choosing to value individual autonomy over a right of public discourse, the Court allows state action to sneak in through the back door. In other words, a system of expression that promotes individual autonomy is not a natural occurrence but rather a creation of the state. And the state has elected to promote individual rights.

This is not to primarily argue that the path the Court has chosen is wrong (although, as we will see, discourse theory would see it as problematic), but rather to suggest that arguments that state action is absent from decisions allow the Court to avoid responsibility. As Michelman notes, avoiding difficult ethical questions by resorting to allegedly prepolitical standards is a form of judicial irresponsibility.[118] Sunstein urges us to change the question from whether there is state action to what we can do to create more deliberation about public life within society. The absence, or presence, of state action cannot automatically be considered to be the means to that end. In that same manner, the idea that streets are a public forum is a creation of the state, maintained and administered by government.

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[116] Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995), at 575.

[117] *Id.*

Habermas makes an even stronger argument against overvaluing individual autonomy. As we have seen, Habermas' idea of basic rights is a mixture of both individual rights and participatory rights. He breaks from traditional liberal theory when he argues for a right to participate in the formation of opinion and will formation. Toward that end, the purpose of freedom of expression is not solely to allow individuals to express themselves (be it in a search for truth,[119] a more tolerant society,[120] or to protect the antiauthoritarian in all of us, as some theories suggest[121]), but rather to allow individuals to share ideas about how to live their lives. For Habermas, discourse is vital because it begins the process of turning particular interests into generalizable interests.

In *Hurley* then, discourse legal theory directs us to allow GLIB to gain entry to the parade because of the discursive potential of GLIB and because of the public forum. The

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[118] See *supra* note 24.

[119] See ZECHARIAH CHAFEE JR., FREE SPEECH IN THE UNITED STATES (1941).

[120] See LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA (1986).

Court rejected *Turner* as a guiding case primarily because cable, much like a newspaper, is not viewed historically as being a public forum.[122] However, that is not the case, which Justice Souter freely admits, for city streets. The public forum issue, which the *Hurley* Court clearly glosses over, differentiates *Turner* from *Hurley* in the eyes of discourse theory.

VI. Conclusion

It has been argued in this paper that discourse legal theory, as represented by the writings of Michelman, Sunstein, and more systematically by Habermas, represents an attempt to merge law and ethics. The writers, while differing on some points, refuse to separate law from ethics and recognize the importance of the courts, and government, in aiding in the creation of a just society. Law, in discourse theory, does not deal solely with legal questions. As James Boyd White reminds us, law is a culture. We learn law, he tells us, by participating in a culture and "learning its language."[123] As he writes, "At every stage the law is in this sense an ethical and political activity and should be understood as such."[124]

This paper argued that by valuing discourse as the final goal, rather than an instrumental search for truth as in much liberal free speech theory, speech is expected to

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[121] See STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE (1990).

[122] This is not to suggest that discourse legal theory would not see cable as being a public forum, nor that the legal system ought to recognize cable as a public forum. Rather, it is merely to note that the Court has been moving toward viewing cable as being a form of individual property rather than a public forum for some time. Justice Kennedy's majority decision in *Turner*, suggesting that broadcasting can be more heavily regulated cable because of its relative lack of scarcity, is evidence of this move. See *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445 at 2466 (1994).

[123] WHITE, *supra* note 12, at xiii.

[124] *Id.*, at xiv.

play a different role in society. As has been shown through a critique of the Court's *Hurley* decision, discourse legal theory is more sensitive to promoting and equalizing speech in society and less concerned about protecting legal concepts such as property and state action. Discourse legal theory calls on citizens and lawmakers to be more concerned about whether actions and decisions will promote deliberation among citizens as opposed to protecting established standards—standards that discourse theory sees as being destructive of democratic society.

Mass Communications Research in First Amendment and Other Media-Related Federal Court Opinions

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Mass Communications Research in First Amendment and Other Media-Related Federal Court Opinions

Saks (1989) wrote, "the law's principal problem [is] that it is policy analysis without the benefit of data" (p. 1110). As social science advances, it is increasingly seen that much of what passes for common sense and common knowledge--traditional bases for judges making decisions--is simply wrong. Thus, social science research has at least the potential to play an important, and hopefully helpful, role in legal disputes. This paper concentrates primarily on the current and potential use of only one type of social science research--journalism/mass communications research--in only two types of case--federal cases concerning the First Amendment and media. To present a more complete picture, and place such research in context, this paper examines mass communications research used in non-First Amendment cases, non-journalism/mass communications social science research use in First Amendment cases, and the use of research from the various social sciences in all types of federal cases. This paper does not address "law and social science" (Lempert and Sanders, 1986) or "communications and law" (Cohen and Gleason, 1990).

This paper is not the first to document use of social science research in some specific types of First Amendment cases. Bernacchi (1978), Robin and Barnaby (1983), Lipton (1987 and 1988), Evans and Gunn (1989), Monahan and Walker (1994), and others have extensively addressed the issue of social science research in trademark cases, while Glassman (1978), Clark (1993), Linz *et al.* (1991), Lindgren (1993), Monahan and Walker (1994) and others have examined the use of social science research in obscenity cases. But this paper is apparently the first to start assessing the overall role of journalism/mass communications research in federal jurisprudence or the overall role of the highest type of social science research in federal cases.

It concludes, for numerous reasons that are detailed, that U.S. courts can and should look to mass communications research more often when deciding media-related cases, particularly First Amendment cases. This is not the first paper to take this position. Attig (1987) criticized the Attorney General's Commission on Pornography: Final Report, complaining about how it "reinforced the mistaken notion that social science research remains 'inconclusive' about pornography" (p. 126), and pointed out the existence of contrary social science research (in both the effects and content areas). Attig did not investigate how courts have or have not used specific research in individual cases, nor give any direction as to how courts could use mass communications (or psychology) research on pornography in the future. Finally, his discussion on pornography was misdirected: it is legal and likely always will be so, he did not summarize how courts have or have not defined and/or ruled on pornography, and he did not specifically identify research into pornography that federal courts would consider obscene.

Social Science Research in U.S. Courts (Esp. Civil Cases): History

Justice Holmes (1897) predicted almost 100 years ago that "For the rational study of the law the black letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics" (p. 469). Modern social science research was first used in court by Louis Brandeis, who submitted it to the Supreme Court in *Muller* v. *Oregon* (1908). Although his brief wouldn't hold water today (Sperlich, 1980, p. 285, n. 31; Rustad and Koenig, 1993, p. 106), the term "Brandeis Brief" is commonly known and used (Rustad and Koenig, p. 93, n. 5). His brief is frequently linked to the so-called legal realist movement, which called for judges "to do more than engage in the deductive, almost mechanical, process of identifying and applying preexisting legal rules to the facts of individual cases" (Acker, 1990, p. 1). The Supreme Court began "significant citations of social science" in 1916 when Brandeis was appointed (Rustad and Koenig, 1993, p. 107), and Monahan and Walker (1986) claim that "By the 1930s, classifying social science as fact was deeply ingrained in the thinking of the Court" (p. 481). But Acker (1990b) reported that brief writers "continued to urge the Court to take notice of social science authorities in protective legislation cases subsequent to Miller, but the justices generally were not receptive to these overtures" (p. 2), and Hovenkamp (1985) concluded that before the 1950s, the Supreme Court largely ignored Brandeis briefs. They do agree that it wasn't until *Brown* v. *Board of Education of Topeka* (1954) that law saw the "beginning of the modern era of the Supreme Court's use of social science materials"; *Brown's* seven authorities in footnote 11, "probably the most controversial footnote in American constitutional law" (Rosen, 1980, p. 9).

The first major law review article forming a theoretical and methodological basis for social science in the courtroom was Kenneth Culp Davis's in 1942. Although oriented toward use of social science research and other facts in administrative law proceedings, Davis's article was seminal due to its postulation of "adjudicative facts" and "legislative facts"--terms and definitions that dominated discussion of social science in law for over 40 years.

Current Role of Social Science Research in American Courts

Commentators Rosenthal and Black (1993) say that today "empirical research is presented with increasing regularity to judges and juries as trial evidence" (p. 1209). But Marvell (1978) found that only 7% of decisions of one state supreme court included empirical data, and that only one-sixth of decisions employing "social facts" evidence (see below) used empirical data. Johnson (1974) found that only 20% of 1925-1938 Supreme Court decisions cited non-legal materials, as compared with 50% of 1938-1970 decisions, Friedman (1981) found that state supreme courts cited social science, economic or technical studies in only .6% of 1940-1970 cases, and Acker (1990b) found that only 13.8% of Supreme Court decisions in criminal cases between 1958 and 1987 contained references to social science. Acker noted, "Those writing on the subject... have generally assumed that social science information has been utilized in Supreme Court decisions with increasing regularity," but "surprisingly little is known, however, about either the justices' baseline use of social science authorities, or many other aspects of their uses of social science information" (p. 1). He (Acker, 1990a) observed that "Both the justices and the brief writers tended to cite traditional legal authorities that discussed social science findings instead of referring directly to social science periodicals and statistical reports. The justices ...did not cite periodicals other than law reviews as social science until the last five years of the study, the 1978-1982 Terms, when 21 NonILPs [i.e. journals not in the *Index to Legal Periodicals*](14%) were cited for social science purposes" (p. 31). What is known about other judges (Acker, 1990b) is, "The lower courts rarely cited social science materials in the cases that reached the Supreme Court, and made virtually no contribution to the justices' acquisition or evaluation of the research evidence" (p. 12); the Court's social science references have been "irregular...over time" (p. 13); "the justices have few inhibitions against securing social science information on their own...They favor familiar volumes as sources...including books, government documents and law reviews. However, they have recently begun to overcome their resistance to citing primary social science references directly" (p. 14).

Acker was only the second commentator (following Rosenblum, 1978) to actually study social science citations by number, type (in text versus in footnote), lengths of citation and discussion thereof (both counted in lines), source (included in brief or new to opinion), opinion type (majority, concurring or dissent), and authoring justice. But he studied only 40 randomly-selected criminal cases from each of six five-year periods, ending in 1987. This paper is believed to be the first effort to conduct a census of all citations to all journals in all years in an entire social science discipline, and certainly the first to present a such a census for several disciplines at once.

Several commentators believe that social science is sometimes used by judges and lawyers primarily or solely for reasons other than making a decision, or winning the case, respectively Wisdom (1975), Marvell (1978, p. 116), and Bernstein (1968, p. 79). Falk (1994) explained, "As in the integration, abortion and death penalty contexts, litigants lacking the weapons of legal doctrine, historical protection, or social consensus, have turned to the weapons that are available--information provided by science and social science" (p. 5). Whatever the reasons why social science is introduced into the legal process, regardless of how courts use it, and despite some continued hostility to it, social science in American courts is here to stay.

Common Law of Evidence Admission

For 70 years, from 1923 to 1993, the common law rule for admission of scientific evidence (in written briefs or expert testimony), stemmed from *Frye* v. *United States*, 54 App.D.C. 46; 293 F. 1013 (1923). The *Frye* appeals court held that expert opinions based on scientific technique are inadmissible unless the methodology were "generally accepted" as reliable within the relevant scientific community, and much academic literature since had poked holes in this rule: what does generally accepted mean? generally accepted by whom? how is generally accepted proven? etc.
The *Frye* test was thrown out by the Supreme Court in *Daubert* v. *Merrell Dow Pharmaceuticals Inc.*, 113 S.Ct. 2786 (1993). Justice Blackmun's opinion for a unanimous court held that Federal Rule of Evidence 702 controls expert testimony, and that nothing in the federal rules as a whole, or

in the text and drafting of Rule 702, gave any indication that "general acceptance" is explicitly or implicitly required. Instead, Blackmun wrote, trial judges should consider: 1) whether the theory is capable of being and has been tested; 2) whether the theory has been subjected to peer review and publication; 3) the theory's error rate; and 4) whether the theory is generally accepted.

Federal Rules of Evidence

Social science methodology and results, like all other information, opinions or items submitted in a court of law, are subject to the Federal Rules of Evidence, most notably: Rule 702, and the two-pronged (materiality and probative value tests) Rule 401: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." Walker and Monahan explained materiality, "In the context of social fact evidence, this means that even research flawlessly executed is inadmissible if the substantive law governing the case does not put in issue the fact that the research seeks to establish" (p. 883). Thus, courts have ruled in obscenity cases that surveys used to determine patent offensiveness must address only the local community's standards (see *Smith* v. *United States*, 431 U.S. 291 at 304 [1977], or *Commonwealth* v. *Trainor*, 374 N.E.2d 1216 at 1222 [1978]), and in trademark cases that the issue is whether consumers or potential consumers, not the general public, are confused by an alleged infringement (see *Hawley* v. *United States Trunk Co.*, 259 F.2d 69 [1958], or *Rolls-Royce Motors, Ltd.* v. *A & A Fiberglass, Inc.*, 428 F.Supp. 689 at 695 [1977]). Walker and Monahan explained probative value as: "this means that even if the research directly addresses a fact of central concern to the substantive law, it will not be admitted unless the research data provides insight into the likelihood that the fact exists" (p. 885).

Commentators' Analysis & Recommendations

Categorizing Uses of Social Science

Monahan and Walker have described another use for social science research called "social framework," which provides overall context for a case at hand. Although their proposals place a high level of confidence and responsibility on judges and social scientists over juries, litigating parties, litigants' lawyers, and other witnesses, they have well justified this bias. Social scientists would be held to required high standards by judges, who in turn are quite likely to have had more previous experience with social science than a jury member, litigant, other witness or lawyer.[7]

Social Facts (Fact-Finding)

Walker and Monahan (1988, 1991) point out that U.S. federal courts have begun granting precedential value to social science methodology. In *Palmer* v. *Shultz* (815 F.2d 84 [1987]), the U.S. Court of Appeals (DC) reversed a district court decision that had applied a wrong test of statistical significance to plaintiff data; it cited its own precedents and two Supreme Court decisions (*Castaneda* v. *Partida*, 430 U.S. 482 [1977], and, coincidentally for this paper, *Hazelwood School District* v. *United States*, 433 U.S. 299 [1977]). Walker and Monahan noted that as of 1988, courts had not "explained why technical aspects of social science research should be accorded precedential status" (p. 879) They criticized "Courts [that] treat prior decisions on the probative value of social science evidence as if they were decisions on questions of law, with the force of precedent" (p. 885), and speculated that courts fail to distinguish between standard methodologies and their idiosyncratic applications. But having separated them, the scholars concluded that such methodologies are like laws, while applications are like facts, and "To remedy the tendency to overreach, we propose that these precedents be construed narrowly. Thus legal force should be given only to the essential components of relevant social science methodologies, and not to the details of how those methodologies were applied in particular cases" (p. 879).

Social Authority (Law-Making)

Monahan and Walker (1986) conceded that "courts universally view social science research as a type of fact." They noticed that "Obtaining social science research has been cumbersome and sometimes controversial; evaluating research has been frustrating and uncertain; and establishing stable judicial views of particular empirical findings has proven elusive." They examined "whether social science research used to create a legal rule is better analogized to fact or law" (p. 516), and concluded the latter. They believe that problems with judicial use of social science stem from "an early and unfortunate decision" to treat such research as facts (p. 478); their answer was "social authority." Research can be presented directly to the court, they wrote, because Federal Rules of Evidence are silent on both independent judicial investigation and how parties should present legislative fact information. Thus, they argued, under a social authority concept, "courts should treat social science research relevant to creating a rule of law as a source of authority rather than as a source of facts. More specifically we propose that courts treat social science research as they would legal precedent under common law" (p. 488). To do this, "parties should present empirical research to the court in briefs rather than by testimony; and the court may locate social science studies through its own research" (p. 495), adding "there are reasons to believe that written briefs are a superior medium to verbal testimony for communicating technical social science information" (p. 496). They agree with Thomas Korn (1966) that "A written report may be a much more effective way of explaining scientific detail and complexity" (p. 1086), if only because as Thomas Marvell wrote, a trial's question-and-answer format is "longer, less well organized and more difficult to follow than written materials such as Brandeis briefs" (p. 195).

To evaluate social authority, Monahan and Walker understand that (and have responded to) the "most serious objection is that judges cannot properly evaluate the research they may find, and that they may therefore base rules of law either on invalid research studies or upon a misunderstanding of valid research" (p. 498). Courts reviewing social science evidence for the first time "should place confidence in a piece of scientific research to the extent that the research (1) has survived the critical review of the scientific community; (2) has employed valid research methods; (3) is generalizable to the case at issue; and (4) is supported by a body of other research" (p. 499). "[C]ritical review" is "publication of research in refereed journals, or in books that have professional editorial boards" (p. 500). Granting that books receive post-publication "critical reviews in journals" and "[l]iterature reviews...summarize and analyze all of the findings," (p. 501), Monahan and Walker still see academic journals as social science research's primary site.

After first impression, courts should simply use the "four indices of precedential persuasiveness" that they already use for case law: "(1) cases decided by courts higher in the appellate structure have more weight than lower court decisions; (2) better reasoned cases have more weight than poorly reasoned cases; (3) cases involving facts closely analogous to those in the case at issue have more weight than cases involving easily distinguished facts; and (4) cases followed by other courts have more weight than isolated ones" (Monahan and Walker, p. 498).

Monahan and Walker (1986) observed that "Whether a judge should personally undertake this more detailed inquiry depends upon the competence that the individual judge brings to the task of evaluating empirical research, or upon the amount of effort that the judge is willing to invest in gaining such competence" (p. 511). In any case, to provide judges assistance with evaluating research, and thus prevent "serious errors" in research's use, Monahan and Walker (1986) point out that the "two most frequent proposals are for the court to notify the parties of its intention to rely upon a research study, thereby bringing the parties and their experts into the evaluation process, or for the court to have access to its own scientific advisors" (p. 509). Under their scheme, in which empirical studies are considered matters of fact, appellate courts would be bound by lower court findings of adjudicative facts if the latter's evaluation weren't "clearly erroneous," but appellate courts would not be found by lower court findings of adjudicative facts (p. 513).

Social Framework (Providing Context)

Walker and Monahan (1987) explained "social framework" evidence after observing that "empirical information is being offered that incorporates aspects of both of the traditional uses [legislative facts/adjudicative facts]: general research results are used to construct a frame of reference or background context for deciding factual issues crucial to the resolution of a specific case" (p. 559). Social framework evidence prompts four concerns, they said. First, whether framework evidence meets the two-part relevance test required by FRE 402, can be dealt with on a case-by-case basis by judges. They rejected the second, that framework evidence might prejudice or confuse jurors, explaining that framework evidence never is emotional and is sometimes criticized as "cold." Moreover, that "aggregate statistical information, in actual practice, is likely to be highly *undervalued* by lay decisionmakers"--contrary to common wisdom that "naive jurors who are overly deferential to anything portrayed as 'science'" will "accord[] under (and thus 'unfair') value to empirical research" (p. 576, emphasis in original). They also demolished the third and fourth concerns, that social framework evidence has little to no ability to "assist the trier of fact to understand the evidence or to determine a fact in issue," as required by FRE 702, and asserted that framework evidence does not, as feared, involve admitting character evidence.

Procedural Use of Social Science

Monahan and Walker allow the admission of individual even narrow social science studies, assuming they meet admission criteria. But Rosenthal and Black (1993), approaching the idea of "general acceptance" from a social scientific rather than legal perspective, have argued that "in many types of legal cases, it also no longer seems acceptable, defensible, or professionally responsible to present to a fact finder the results of individual research studies that claim to contribute to the resolution of controversy" (p. 1222). They propose meta-analysis, the "set of concepts and principles employed to summarize quantitatively any domain of research," because "compared to traditional reviews of the literature, meta-analytic procedures are more accurate, comprehensive, systematic, and statistically more powerful" and it has a "unique ability to increase *retroactively* the benefits and lessen the costs of the studies being summarized" (p. 1221). Rosenthal and Black's idea has not met opposition, despite Grossman's (1992 and 1993) criticisms of the "consensus-basis for...admissibility."

II. Court Citations/References to Social Science in Media Opinions

Although numerous studies have been conducted on court citation patterns, almost all and perhaps all of them have concentrated on particular periods, individual states, references to previous cases (*stare decisis*) and/or citations to law reviews. For instance, Falk (1994) found that 30% of cases she referred to as First Amendment cases contained references to social science research findings (p. 14), the same as another group of cases, slightly more than a third group and slightly less than a fourth group; however, her research was very limited to scope.

Journalism & Mass Communications Academic Journals

Mass Communications Research in First Amendment and Other Media-Related Federal Court Opinions

A search of the Nexis-Lexis database of all U.S. federal court decisions for references to and/or citations of articles in journalism/mass communications academic journals found references to only six journals through the January 1, 1997. No references were found to 21 other major mass communications journals that are regularly indexed in *Communication Abstracts.*

Journalism Quarterly, now *Journalism and Mass Communications Quarterly* has had articles cited in only two cases: *Citizen Publishing Co.* v. *United States* (394 U.S. 131 [1969]) and *United States* v. *Moreno Morales* (815 F.2d 725 [1987]). *Citizen* resulted from the U.S. Justice Department charging Citizen Publishing Co. of Tucson, Ariz., with violating the Sherman Act, after in 1965 it bought the Tucson *Star*, a paper with which it had had a joint operating agreement since 1940. The Supreme Court upheld lower courts' conviction of Citizen, which in turn required the *Star*'s divestment and the JOA's dissolution. Justice Potter Steward's dissent quoted, in a footnote, Ray's 1952 *JQ* article ("Economic Forces as Factors in Daily Newspaper Concentration") on the sole point that more than half of all newspapers ceasing publication between 1909 and 1952 did so between 1937 and 1943. This was not a First Amendment case, and the data was available elsewhere. In *Moreno Morales*, nine defendants were convicted of conspiracy, making false statements to a grand jury, obstructing justice and perjury. The federal appeals court ruled that they were not deprived of a fair trial despite widespread publicity; to uphold eight of the nine perjury and conspiracy counts; and that sentences were not excessive. Lengthy opinions dealt with the clash between free press and fair trials, but *JQ* was only one of seven cases, books and articles cited by Judge Torruella (who concurred in part and dissented in part) on "the cumulative effects that eight years of unremitting publicity held on the conscious and unconscious attitudes and opinions of those subjected to its influence" (p. 768). (The article cited was "Prejudicial Publicity: Its Effect on Law School Mock Juries" [JQ 43, 113-114, 116] by Kline and Jess!)

Journal of Advertising Research has had articles cited in only two federal cases: *Cimino* v. *Raymark Industries, Inc.* (751 F.Supp. 649), and *44 Liquormart* v. *Racine* (829 F. Supp. 543 [1993]). *Cimino* concerned settlement of class action asbestos litigation. The court, demonstrating the widespread use and acceptance of statistics, noted that its "techniques are particularly valuable to the field of marketing" (p. 660); one example was Biel and Bridgwater's article, "Attributes of Likable Television Commercials" (*JAR* 30, 38 [1990]). In *44 Liquor Mart* v. *Racine*, the court noted Wilcox's article, "The Effect of Price Advertising on Alcoholic Beverage Sales" (*JAR* 25, 33 [1985]) as one of a group of studies producing what the court called 12 different conclusions on the subject. Citations of *Journal of Consumer Research* articles were found in opinions in *44 Liquormart* (829 F. Supp. 543, and 39 F.3rd 5)--Ornstein and Hanssens' "Alcohol Control Laws and the Consumption of Distilled Spirits and Beer" (*JCR* 12, 200 [1985]) and *Melso* v. *Texaco*. In *Melso* (1982), the court cited Garcia's article, "Credit Cards: An Inter-Disciplinary Survey" (*JCR* 6, 327 [1980]) as proof on growth in the credit card industry. In short, only the articles cited in *44 Liquormart* are related to mass communications scholarship.

Journal of Broadcasting & Electronic Media has had articles cited or referenced in only two cases: *Brandywine-Main Line Radio, Inc.* v. *FCC* (473 F.2d 16) and *National Citizens Committee for Broadcasting* v. *FCC* (555 F.2d 938). In the former, a footnote in Judge Bazelon's dissent simply cited Cox's article (*JB* 11, 97 [1967]) along with a law review article that both said it was the first case in which the FCC had denied a license renewal because of the fairness doctrine. In the latter, the court paraphrased in text Anderson's study (*JB* 51 [1971]) that found that newspaper ownership of television stations has not harmed the public interest. The court pointed out, "The study finds no significant difference in content between individually and cross-owned stations in the sample cities and concludes divestiture is unnecessary. Although the study has an objective format, it is based on content analysis that necessarily entails subjective judgments" (at 957). Sources other than Cox's article, not the result of social science theory and method, were available to the *Brandywine-Main* court; Anderson's study, however, was a social science project.

Journal of Communication has had articles cited in only three federal cases: *Snell* v. *Suffolk County* (611 F.Supp. 521), *Shurberg Broadcasting of Hartford Inc.* v. *FCC* (876 F.2d 902), and *Metro Broadcasting Inc.* v. *FCC* (497 U.S. 547). *Snell*'s opinion cited a Summer 1976 article by LaFave and Marshall, "Does Ethnic Humor Serve Prejudice?" as one of a group of articles that have addressed that topic generally. *Shurberg* cited Gerber and Gross's article, "Living with Television: The Violence Profile" (*JOC* 26, 176 [Spring 1976]), on television generally; the professors had pointed out that television doesn't require literacy or mobility, that is available around the clock, that it reaches people directly, and it precedes (and is increasingly preempting) reading. The text of *Metro*'s majority opinion mentioned Schement and Singleton's article, "The Onus of Minority Ownership: FCC Policy and Spanish-Language Radio" (*JOC* 31, 78 [1981]) with regard to how many Hispanics own and manage radio stations. Gerber and Gross's article is one in a long line of such studies by mass communications academics, and Schement and Singleton's article is typical of media management and minority media studies; the ethnic humor article is more closely related to sociology, political science, and speech/rhetoric concerns.

Public Opinion Quarterly has had articles cited in only four federal cases: *Furman* v. *Georgia* (408 U.S. 238); *Mississippi State Chapter, Operation PUSH* v. *Allain et al.* (674 F.Supp. 1245); *Gunn* v. *Chickasaw County* (705 F.Supp. 315); and *Cimino* v. *Raymark Industries, Inc.* (751 F.Supp. 649). *Furman*, in which the death penalty was held by a 5-4 vote to constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments, prompted a tour de force of history lessons and social science evidence from the justices; Chief Justice Burger used Erskine's article, "The Polls: Capital Punishment" (*POQ* 34, 290 [1970]) to argue that public support for the death penalty supposedly increased to 51% in 1969 from 42% in 1966. Noting a shift away from state death penalty laws, he "suspect[ed] that the legislatures in general have lost touch with current social values" (p. 386). In *Operation Push*, the district court ruled that certain acts and failures to act by Mississippi officials "violated prohibition against voting qualification or prerequisite to voting imposed in manner resulting in denial or abridgement of right to vote on account of race" (p. 1245); one of dozens of factual findings was that "census data notwithstanding, it is clear that black registration lags behind that of whites in Mississippi." The court cited J.P. Katash and M.W. Traugott's article, "The Consequences of Validated and Self-Reported Voting Measures" (POQ 45, 519 [1981]) to support its conclusion that "self-reporting has shown to be inaccurate when the self-reported data on registration and voter turnout are compared to actual registration and voting records" (p. 1254). Gunn cited by *POQ* simply by quoting the *Operation Push* opinion.

Cimino's reference to *POQ* was for an example of how "[s]tatistics have likewise become very important in the political arena" (p. 660); Sigelman's article, "Disarming the Opposition: The President, the Public, and the INF Treaty" (*POQ* 54, 37 [1990]) had reported how the president's support for the treaty affected "foreign policy 'hard-liners'" (p. 661). All of these articles are more closely related to political science and sociology scholarship than to mass communications.

Other Social Science Academic Journals

Not only are references to mass communications journals in First Amendment and other media-related cases minimal, so are references to other social science journals. Of cases checked, only *44 Liquormart* and *Virginia Citizens Consumer Council* v. *Virginia State Board of Pharmacy* were First Amendment cases with non-mass communications social research cited.

Other Social Science Research: Obscenity & Trademarks

Two areas of law in which social science research have long been used are obscenity law and trademark law. Although a complete survey of social science other than academic journal articles is outside the scope of this paper, some examples may be helpful to provide context. The Monahan and Walker (1994) casebook starts with *People* v. *Muller* (96 N.Y. 408 [1884]) and demonstrates through *Smith* v. *California* (361 U.S. 147 [1959]), *Jacobellis* v. *Ohio* (378 U.S. 184 [1964]), *Miller* v. *California* (413 U.S. 15 [1973]), *Paris Adult Theatre I* v. *Slaton* (413 U.S. 49 [1973]), *Kaplan* v. *California* (413 U.S. 115 [1973]) how up until 1980, obscenity prosecutors did not have to offer expert evidence, and the defense could be barred from offering expert evidence. But courts approved defendants' uses of public opinion surveys in *People* v. *Nelson* (88 Ill.App.3d 196 [1980]), *Carlock* v. *State* (609 S.W.2d 787 [1980]), and *Saliba* v. *State* (475 N.E. 2d 1181 [1985]). A survey was barred in *Commonwealth* v. *Trainor* (374 Mass. 796 [1978]), as were an "ethnographic study" in *U.S.* v. *Pryba* (678 F.Supp.1225 [1988]), and focus group results in *St. John* v. *State of North Carolina Parole Commission* (764 F.Supp. 403 [1991]). The book cites no usages of academic journals, although some might have been used. The record is similar in trademark cases; space limitations prevent a fuller description.

III. References to Other Social Sciences in Other Legal Opinions

In an attempt to place in context the startlingly low number of references to mass communications journals in federal court opinions, a search--again using Nexis-Lexis--was made to find any and all references to journals in the academic fields of economics, psychology, and political science. Anthropology, geography, sociology and speech articles can be found in future research.

The methodology was a content analysis largely inspired by Acker (1990a & 1990b), but is different in significant ways. Starting with Monahan and Walker's 1986 criteria for social science research as evidence, it was determined that searching only for those books with professional review boards would not have been easy or foolproof; thus searches would be only for academic journals. These searches, in turn, were limited to those indexed in a major standard index, and published in English in a primarily English-speaking country; an attempt was made to also exclude publications of a purely consisting solely of legal, medical or government statistics content. Records were made, in the fashion for a content analysis, of the journal cited; the opinion's year; the court-type (Supreme, Court of Appeals, District Court, Tax Court, Bankruptcy Court, Military Appeals, Veterans Appeals, Claims Court); whether the social science article was cited/referred to in body text, footnote or appendix; whether it was mentioned by itself or in a group of other citations (which could include other journal articles, previous cases, books, government documents, or other printed materials); whether it was quoted/paraphrased or simply referred to generally; whether the court mentioned a specific page of the article in addition to a general reference to the first page or a page span; and which type of opinion cited the social science article (three types: *per curium*, plurality and majority opinions were grouped, as were opinions concurring with the court opinion and/or judgment; the third type were all dissents). For record completeness and future research, the case name and the social science article author's name also were noted. An initial plan to record how many times the social science article was cited in the same opinion proved infeasible, primarily because of the cumbersomeness of searching for successive references to articles in opinions. Journal names were recorded to discover to find out journals cited (by number and type). The opion's year was noted to provide at least circumstantial evidence of changes in federal courts' citations over time. Court type was recorded to again teast whether higher courts do, as claimed previously, cite social science sources most often. Opinion type was noted to provide evidence as to whether majorities and/or dissenters use social science evidence relatively more often. The other three measures were designed as proxies for how important courts regarded their citations of social science research, and how important they believe individual items of social science research to be. Because of this study's preliminary nature, no distinction was made between citations supplying "facts," "framework," or "authority" evidence.

Economics

Searches were conducted for all journals published in English in primarily English-speaking countries and indexed in the *Journal of Economic Literature*, with the exception of several journals whose names were not searched for due to the fact they would have required checking thousands of uses of the word or phrase that is the journal's title. Of 343 references to individual economics journal articles, 77 appeared in Supreme Court opinions, 153 by appeals courts, 90 by district courts, 11 by tax courts, 6 by bankruptcy courts, 6 by claims courts, 1 by a military court, and 1 by a veterans appeals court. The split by opinion type was majority/plurality: 273; concurring opinions: 12; dissents: 57; counsel opinions: 2. Reference locations were 278 in text, 56 in footnotes and 8 in appendixes. The split between articles quoted or paraphrased, and those simply mentioned was 177 to 165, respectively. The split between articles mentioned in an isolated way and those mentioned in a group of sources was 130 to 206, respectively. The split between those for which a specific page was mentioned versus those not was 128 to 214. By time, citations were found during 1907-1916: 1; 1917-1926: 6; 1927-1936: 6; 1937-1946: 12; 1947-1956: 8; 1957-1966: 19; 1967-1976: 39; 1977-1986: 102; and 1987-1996: 150. Overall, economics research has long been recognized and used by federal courts. Courts take it seriously: it usually is mentioned in body text, not footnotes; quoted or paraphrased more often than simply mentioned (but less often with an exact page reference to a specific fact or idea mentioned), and usage of economics research has grown quickly over the past 30 years. However, research is often cited in groups as if one article is not enough to substantiate a particular fact, opinion or idea.

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Psychology

Psychology has a long history of involvement and potential involvement in the U.S. judicial system. Hugo Munsterberg was quoted by Cairns (1936) 60 years ago on the idea that knowledge of psychology could help resolve legal issues and disputes, possibly at about the same time Justice Frankfurter was quoted as criticizing psychology as "a domain which I do not yet regard as science in the sense of mathematical certainty" (quoted by Rosen, 1972, at 142).

Due to the number of psychology journals published and indexed, the search was limited to the classified by *Psychological Abstracts* as General (all); Applied (all); Consulting/Clinical (General, Assessment, Substance Abuse and Other Special Areas groups, but not Healthy Psychology); Counseling (General group only); Criminal and Legal Issues (all); Educational (General, and School Psychology groups only); Personality/Social (General, Social--General, Conflict/Criminal Issues, and Work groups only). This excluded not only certain subgroups, but entire major heading groups: Autism/Mental Retardation; Developmental; Experimental; Methodology; Neuropsychology/Neuroscience; Physiology; and Treatment; on the other hand, however, much overlap exists in the groupings, and many titles appearing in included groups, and therefore searched for, also are included in general groups otherwise excluded. Again, several journals whose names are so generic were not searched for due to the fact they would have required checking thousands of uses of the word or phrase that is the journal's title.

Of 137 references to individual psychology journal articles, 33 were cited by the Supreme Court, 68 by appeals court, 35 by district courts, and 1 by a bankruptcy court. The split of opinion types was majority/plurality: 93; concurring opinion: 10; dissents: 34. The split between references in text and footnotes was 117 to 20. The split between articles quoted or paraphrased, and those simply mentioned was 59 to 78. The split between articles mentioned in an isolated way and those mentioned in a group of sources was 50 to 87. The split between those for which a specific page was mentioned versus those not was 45 to 92. By time, citations were found during 1957-1966: 3; 1967-1976: 14; 1977-1986: 56; and 1987-1996: 64. References to psychology journals was a relatively late development for federal courts, but they now take such research seriously. Articles are usually cited in body text, quoted or paraphrased almost as often as not, and growth in citations exploded from 1967 to 1986. However, articles are usually cited in groups, as if one article is not enough to prove an idea, fact or opinion.

Political Science

Academic journals indexed in *ABC POL SCI* were searched for. Again, several journals whose names are so generic were not searched for due to the fact they would have required checking thousands of uses of the word or phrase that is the journal's title.

Of 284 references to individual political science journal articles, 83 were by the Supreme Court, 118 by appeals courts, 68 by district courts, 4 by tax courts, 4 by military courts, 2 by bankruptcy courts, and 4 by claims courts. The split of opinion types was majority/plurality: 200; concurring opinions: 15; dissents: 60; and counsel: 5. Reference locations were: in the text: 217; in footnotes, 60; and in appendixes: 4. The split between articles quoted or paraphrased, and those mentioned was 129 to 155, respectively. The split between articles mentioned in an isolated way and those mentioned in a group of sources was 118 to 166, respectively. The split between those for which a specific page was mentioned versus those not was 118 to 166. By time, citations were found during 1907-1916: 2; 1917-1926: 5; 1927-1936: 9; 1937-1946: 30; 1947-1956: 15; 1957-1966: 24; 1967-1976: 41; 1977-1986: 70; and 1987-1996: 88. Overall, political science research has long been recognized and used by federal courts. Courts seem to take it seriously: they mention it usually in body text, not footnotes; quote or paraphrase an article almost as often as simply mentioning it, and less often provide an exact page reference to the specific fact or idea mentioned; usage of political science research has grown quickly over the past 30 years. However, research is often cited in groups as if one article is not enough to substantiate a particular fact, opinion or idea.

IV. The Lack of References to Social Science in Media Law Opinions

Many apparent or theorized reasons may account for social science research, particularly journalism and mass communications, not being used more often in opinions by federal judges. Commentators agree that social science generally still has its skeptics among judges, lawyers, and/or law school professors and that relatively few law schools teach social science evidence- oriented courses (Lochner [1973]; Trubek and Plager [1985, p. 484]; Monahan and Walker [1985, pp. 478-481]; Saks and Kidd [1980-1981, p. 149]; Saks [1989, p. 1115]). Sometimes, academic research is ignored because results are too contrary to existing beliefs or laws (Getman [1985]). But does any of this explain why especially mass communications research is almost never cited?

Is Mass Communications Research Available/Accessible to Judges?

The relatively low number of citations to social science research sometimes has been attributed to such research being physically unavailable, or intellectually inaccessible. But Falk (1994) concluded that, "First, social science has become more readily accessible to lawyers trying their cases because: (1) social scientists have published more of their research in law reviews and other legal journals and (2) the computerization of information sources has permitted lawyers to have direct access to social science journals" (p. 57). Monahan and Walker also have explained at length, logically, why judges can and do have the necessary basic understanding of social science.

Mass Communication is a "New" Social Science

Theories/Methods Not as Developed or Settled Within Field

Several characteristics of mass communications academia suggest theories as to why mass communications research might not be widely known or accepted outside academia. Mass communications as an academic discipline is relatively new (Dennis and Wartella, 1996, p. 129). The first doctorate in journalism wasn't granted until the late 1940s, and doctorates in mass communication were relatively uncommon until the early 1960s. Guido Stempel III, the first journalism Ph.D. from the University of Wisconsin (Sloan, 1990, p. 314) didn't retire until 1996.

Mass communications research started significantly later than journalism education (Dennis, 1996).*Journalism Bulletin*, now *Journalism and Mass Communication Quarterly* wasn't founded until 1924; it published no theoretical articles until 1945, and only 21 such articles by 1954 (Dennis & Wartella, p. 130). The first journalism research book appeared in 1949, the second not until 1958 (Westley and Stempel, 1989, p. 1). Finally, a long battle ensued both within academia, and between academia and the working media, about the optimal balance of "skills" courses and "academic" courses. This issue seems damaging. Dennis (1992, p. 82) wrote about this tension's results: "Journalism and communication schools are thus light-years from the relative maturity of schools that train future legal or business talent" (p. 82).

Mass communications research is easily contrasted with other fields. Astronomy, biology, geography, medicine, politicala science and rhetoric all date in some way to ancient times; and economics at least to Adam Smith's *Wealth of Nations* (1776). But psychology and sociology also have been widely accepted by law, academia and the greater society, but the psychology is not much older, and sociology emerged at about the same time (Dennis and Wartella, p. 9). One could argue that although most of the so-called major questions have been answered in fields such as geography, speech/ rhetoric, political science and capitalist economics, that this is not true about mass communications. Dennis (1992) noted that "Within almost any university community one can hear occasional charges that communication has no corpus of scholarship, no body of significant research" (p. 81), a charge he didn't deny. Indeed, the original question of media effects (if and how, perhaps why media affect people) is still largely unanswered. Research has shifted over time from media effects on behavior to effects on opinions and then effects on knowledge; underlying assumptions have shifted from the entire public as manipulatable, to none of the public as manipulatable, to a growing realization that probably few general rules exist. Unfortunately, much of these shifts seem to have sociopolitical, not psychological origins. But a conclusion that existing research has definitively answered few questions is not unique to mass communications among the social sciences; much the same could be said about anthropology--a field in which many questions will never be answered for lack of evidence--and more significantly, sociology and psychology. In any case, a belief that mass communications researchers have not conclusively answered certain questions does not mean that the field has nothing at all to offer to law.

Is Journalism & Mass Communication a Unique Social Science?

Perhaps mass communications research is somehow different than other social science research: perhaps it is relevant to fewer cases, or perhaps its theories and methods are significantly different, or perhaps its findings are not as valid and/or reliable, or perhaps the relevance, quantity and quality of its research are not as well known (essentially a PR problem!)

Perhaps judges look to mass communications research for materials but can't find what they want. Faigman (1991) observed that "when finding constitutional facts, the Justices often lament the absence of social science research to aid them in their task"; for instance, he reported that in three cases, the Justices could not "find much in the social science literature either to help confirm or to cast doubt upon their judicial hunches about how juries deliberate under different decisions rules." Although one would be hard-pressed to think of an instance in which agenda-setting or gatekeeping research would be relevant in a legal dispute, a closer look at the depth and breadth of mass communications research reveals much useful material (see McQuail, 1994). Research into communication models generally and media effects specifically could be highly relevant to cases involving: media liability for individual actions (or inactions) due to advertisements or news-editorial/programming content; government regulation-related rulemaking and litigation; traditional First Amendment areas such as libel, obscenity and prior restraint; and other cases. Media performance studies could be relevant to libel suits, government regulation-related rulemaking and litigation, and other cases. Research into media structures and institutions could be relevant to litigation over the Newspaper Preservation Act, anti-trust and related matters; government regulation-related rulemaking and litigation; and international mass communications law and policy. Research into media organizations' environment could be relevant to regulation and anti-trust litigation. Other mass communications research would be helpful in litigation involving consumer fraud, government preferences for one type of media over another or one type of media company over another, the public's "right to information" (such as Freedom of Information Acts, various required disclosures in political campaigns or consumer products), law and policy about liquor and cigarette advertising, political advertising, children's advertising, violence on television, etc. Moreover, a shortage of useful research is unlikely to develop; the body of research continues to grow. Many mass communications scholars have academic, professional and/or philosophical backgrounds that lead to a bias in favor of practical research, and a certain trendiness in research topics partially results.

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Is communications research different from other social sciences?

The idea that mass communications research is less useful than other social sciences because its research theories and methods are significantly different from other social sciences, or its research results are significantly less reliable or less valid, is one that could be held only by persons not familiar with the history and current status of communications research. (This also would invalidate any speculation, for instance, that mass communications research couldn't meet the standards of the Federal Rules of Evidence.) Because academic fields do not emerge fully-formed, early mass communications research was conducted by scholars with degrees in other fields, using theories and research methods from other fields; in fact, research was conducted specifically because it was useful to those fields. Dennis (1996) wrote:

> "From the beginning of this century, legal scholars and historians had at least a passing interest in media institutions and media content. Social psychologists, sociologists, psychologists, political scientists, and other scholars and critics similarly traced and tracked media matters when they were of sufficient interest to warrant study....
>
> "Social scientists became particularly active in media studies, not as an end in themselves, but as part of a larger project on human behavior or individual cognitions. Usually in the realm of applied research, these efforts abutted similar (and sometimes related) work in journalism schools....Although projects at first were simply conducted for their own sake, to ferret out information helpful to business, agriculture, government or the media, on occasion scholars, as they are wont to do, decided to take stock" (p. ix).

Today, mass communication's borrowing of both theories and research methods from other fields has in a sense come full circle. As Dennis (1986) pointed out, "[A]cademic institutions and disciplines heretofore uninterested in mass communication view us with hungry eyes and are developing new instructional programs and research involving media and communication study" (p. 3). While mass communications researchers continue to borrow theory and methods from other disciplines, today they seem as likely or more likely to be borrowed from anthropology, literature and comparative literature, history, and political science, as from the rich sources of psychology and sociology. One need only observe the introduction into mass communications of cultural studies (both domestic and international/comparative), critical theory, revisionist histories of print media, new histories of advertising and public relations, histories of mass communications research itself (such as Sloan, 1990, and Dennis and Wartella, 1996), and other developments to see a field broadening and deepening.

On the issue of how mass communications research methods affect the reliability and validity of results, the discipline has in fact drawn comments from outside, and criticisms from within, for putting too much emphasis on rigorous methods, starting with graduate programs. Dennis (1992) claimed that mass communications doctoral programs

> "are among the most rigorous Ph.D. programs in American universities....It requires expansive knowledge of mass communication, interdisciplinary connections, and competence in the tools of scholarship. Far from conjecture on my part, these observations are made on the basis of comparing requirements in other fields and comments from colleagues in other disciplines. 'I think you people overcompensate,' a political scientist once told me. 'You and your colleagues sometimes overkill on methodology and advanced statistics. We're more relaxed about this,' he said. Part of this 'overkill' of both substance and method springs from a desire to make the doctorate in mass communication as rigorous as possible and to gain respectability among other advanced degree programs" (p. 95).

The most consistent complaints about overemphasis on methodology from within the field have come from cultural studies and critical theory scholars who point out that mass communications scholars conduct too many small, intellectually and politically "safe," and frequently repetitive studies based on a limited number of theories (agenda-setting, gatekeeping, a few others) and using a limited number of methods--content analysis, case study and a few others.

Are Theories & Methods Not as Known outside the Field?

One interesting possibility is that perhaps mass communications research does not get cited as often because the discipline has done a poor job over a sustained period of time of making itself appear (if not actually become) vital to academia, and relevant to government, corporations and the public. Sociologists, psychologists, political scientists and economists often appear on news programs and talk shows as authors and experts. Several of them write guest columns for newspapers or magazines, are quoted by other writers, and generally have a higher profile (think of Milton Friedman, Lester Thurow, Paul Samuelson, John Kenneth Galbraith, Arthur Laffer, William Julius Wilson, Dr. Joyce Brothers, Thomas Sowell, Walter Williams). Who can name a journalism/mass communications scholar whom they have seen on television?

Lack of Public Ignorance or Strong Public Opinion about Media

Falk speculated that courts use social science in gay rights cases to either inform ignorant other courts or the general public about homosexuality, and/or because they believe they need to bolster judicial judgments with scientific and social scientific fact. Conversely, perhaps courts do not cite mass communications research because of some notion that the public and other courts are not ignorant about media and the First Amendment, and/or that the public do not hold strong views about the media that are contrary to constitutional law. Either of these explanations is highly unlikely. Dennis, Marc (1995) and others for years have advocated that students at all levels be taught more about media so that they can intelligently consume it; this idea implies that the public would be less hostile to the media if they knew more about media motives, processes, goals, constraints, etc. Myriad books during the past few years, along with public opinion polls about the media, provide dramatic evidence of intense public hostility, distrust and disrespect for the media.

Litigants/Amici are not Providing Social Science Research to Courts

Commentators agree that at least the Supreme Court started taking notice of *amici* in the 1950s, and at least two conclude after four previous studies that "The most common method of introducing social science evidence to the court is through 'non-record evidence' in *amicus curaie* briefs" (Rustad and Koenig, 1993, p. 94). And although commentators such as Rustad and Koenig (1993) have provided devastating critiques of current *amicus curaie* brief practices, and have in fact made proposals involving social scientists and their associations to neutralize and/or discourage typical briefs, it is unlikely that federal courts will anytime soon take such action. In the meantime, therefore, journalism/mass communications educators and researchers, their professional associations, media industry associations, think tanks (or at least what pass for them in mass communications), and other individuals have the opportunity to educate courts on mass communications research findings. So the question is: are amicus briefs being submitted to federal courts that contain social science evidence on mass communications, particularly--for the purposes of this paper--mentioning academic journal articles? A computer search for *amicus* briefs filed by the Association for Education in Journalism and Mass Communication, International Communication Association, and Speech Communication Association revealed none.

Certainly, mass communications corporations, think tanks, individual scholars, and other interested parties are not filing *amicus* briefs in First Amendment cases in which they have a direct or indirect interest, and/or for which they could supply helpful information.

Courts Find No Need to Cite Social Science in "More Settled Fields"

Perhaps because so much First Amendment case law exists, judges do not believe they need to turn to social science to help them make decisions, or help justify them after the fact. Falk's article (1994) on social science in gay rights cases speculated that courts cite large amounts of research because they perceive much of it as conflicting. She added that "In more settled fields, courts may be more adept at sorting out the 'good' from the 'bad' social science and referring only to that information which has been evaluated as worthy of inclusion" (pp. 51-52).

Falk also spotted a judicial chicken-and-egg question, explaining that "As courts use social science more frequently, attorneys are more likely to turn to social science sources and provide that information to the courts. Complementarily, as attorneys use social science more often, courts are also more likely to use the proffered information in their opinions" (p. 55). In other words, perhaps social science research is not cited in First Amendment and other media related cases simply because social science research traditionally hasn't been cited in such cases in the past.

Courts Cite Research Discussed in Law Reviews, not Directly

Acker's finding that until 1978, the Supreme Court generally cited social science research only by citing law journals that discussed it, rather than citing the original publications, may help explain a continued relatively low number of citations. After all, simply because courts are perhaps now more likely to cite original social science sources doesn't mean they have discontinued citing law reviews that discuss social science findings. (An examination of courts' citations of social science-oriented law review articles is outside the scope of this paper.) Since 1978, several social science and humanities oriented law reviews either were started or gained increased stature.

V. Conclusions: How/Why Research Can/Should be Cited More

Social sciences have, can and do play a significant role in resolving factual, legal and even philosophical or value questions in the U.S. judicial system. Yet previous studies about use of social science in courts were limited in size, scope (criminal cases only), or unsystematic. This study has demonstrated that, regardless of case-by-case motivations, U.S. federal judges are citing social science more often, using academic journal articles as agreed upon evidence. Since *Daubert*, courts have more encouragement than ever to use social science research, and time will tell whether the already existing growth in social science references continues. Published research in journalism and mass communications is used extremely rarely by any measure. Various explanations have been offered as to why courts may choose to use social science research in limited ways if at all. But no single reason satisfactorily explains why mass communications research is cited only a fraction as often as published research in economics, political science and psychology. Perhaps research in these disciplines are relevant to a larger number of cases, perhaps mass communications suffers from the perception (or reality) of a relatively small or unsettled body of knowledge, perhaps courts feel no need to educate other courts or the public by citing "proof" for their decisions, perhaps *amici* cite mass communications research seldom if ever. The discipline is not substantially different in terms of rigor of its theory or methodology; in fact, much of it is obviously borrowed. Mass communications law by itself encompasses libel, privacy, intellectual property, corporate speech, advertising, obscenity, media coverage of trials, source protection, and information access--involving every type of media. In addition, mass communications research is applicable to a large number of issues and disputes involving individuals, governments, corporations, and other organizations, in civil personal and business, and criminal cases. Research in mass communications and the other social sciences is a treasure trove of information the judicial system has barely touched. Whether judges and lawyers can and/or want to is a question only they can answer.

Further research needs to be conducted in many areas: what percentage of federal civil cases cite social science research? What percentages of majority, concurring and dissenting opinions cite social science? Will judges answer questions about how and when they have and have not used, if not cited, mass communications research in making decisions? What do they think of mass communications research? These and many other questions await answers. This paper is a first step toward pointing to what some of the questions are and what some of those answers might be.

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Table

Economics Journals

References were found to: *Accounting Review* (2 references in 2 cases); *American Economic Review* (27, 22); *American Enterprise* (2,2); *American Journal of Agricultural Economics* (3,3); *American Political Science Review* (12,12); *Atlantic Economic Journal* (2,2); *Brookings Papers in Economic Activity* (3,3); *Business Economics* (1,1); *Canadian Journal of Economics* (1,1); *Canadian Tax Journal* (1,1); *CATO Journal* (3,3); *China Quarterly* (1,1); *Columbia Journal of World Business* (1,1); *Contemporary Economic Policy* (1,1); *Demography* (1,1); *Econometrica* (2,2); *Economica* (3,3); *Economic Inquiry* (3,3); *Economic Journal* (1,1); *Energy Journal* (1,1); *Industrial and Labor Relations Review* (12,12); *Industrial Relations* (1,1); *International Review of Law & Economics* (2,2); *Journal of Accounting & Economics* (1,1); *Journal of Accounting Research* (1,1); *Journal of the American Statistical Association* (2,2); *Journal of Conflict Resolution* (2,2); *Journal of Economic Behavior & Organizations* (1,1); *Journal of Economic History* (1,1); *Journal of Economic Issues* (2,2); *Journal of Economic Literature* (8,6); *Journal of Economic Perspectives* (6,3); *Journal of Finance* (7,7); *Journal of Financial Economics* (14,10); *Journal of Forensic Economics* (3,2); *Journal of Futures Markets* (5,3); *Journal of Health Economics* (1,1); *Journal of Human Resources* (9,7); *Journal of Industrial Economics* (2,2); *Journal of Institutional & Theoretical Economics* (2,2); *Journal of Labor Economics* (2,1); *Journal of Labor Research* (2,1); *Journal of Legal Economics* (3,3); *Journal of Monetary Economics* (1,1); *Journal of Money, Credit & Banking* (1,1); *Journal of Political Economy* (52,51); *Journal of Regulatory Economics* (1,1); *Journal of Risk & Insurance* (3,3); *Journal of the Royal Statistical Society* (1,1); *Land Economics* (2,2); *Natural Resources Journal* (42,41); *National Tax Journal* (20,16); *Population Bulletin* (1,1); *Public Choice* (1,1); *Public Finance Quarterly* (1,1); *Quarterly Journal of Economics* (14,13); *Rand Journal of Economics* (1,1); *Review of Black Political Economy* (1,1); *Review of Economic Studies* (3,3); *Review of Economics & Statistics* (11,9); *Review of Industrial Organizations* (3,3); and *Social Security Bulletin* (22,20). Dozens of journals never have been cited.

Psychology Journals

References were found to: *American Psychologist* (11 references in 8 cases); *Behavioral Sciences and the Law* (2, 2); *British Journal of Medical Psychology* (2,2); *British Journal of Social Psychology* (1,1); *Criminal Justice and Behavior* (3,3); *International Journal of the Addictions* (1,1); *Journal of Abnormal Psychology* (4,4); *Journal of Applied Behavior Analysis* (1,1); *Journal of Applied Psychology* (9, 7); *Journal of Applied Social Psychology* (4,4); *Journal of Clinical Psychology* (1,1); *Journal of Consulting and Clinical Psychology* (3,3); *Journal of Consumer Research* (3,3 [detailed above]); *Journal of Cross-Cultural Psychology* (1,1); *Journal of Experimental Social Psychology* (1,1); *Journal of Personality and Social Psychology* (18,16); *Journal of Personality Assessment* (3,2); *Journal of Personality Disorders* (1,1); *Journal of Social Issues* (5,4); *Journal of Social Psychology* (6,5); *Law and Human Behavior* (38,27); *Personality and Social Psychology Bulletin* (2,2); *Personnel Psychology* (7,5); *Psychological Bulletin* (5,5); *Psychological Medicine* (1,1); *Psychological Review* (2,2); and *Psychotherapy and Psychosomatics* (1,1). No citations were found to dozens of journals.

Political Science Journals

References/citations were found to: *Acta Sociologica* (1 reference in 1 case); *American Behavioral Scientist* (1,1); *American Enterprise* (2,2); *American Journal of Sociology* (1,1); *American Political Science Review* (12,12); *American Journal of Political Science* (4,4); *American Sociological Review* (8,7); *Annals of the American Academy of Political and Social Science* (32,32); *Bulletin of Atomic Scientists* (9,5); *California Management Review* (1,1); *CATO Journal* (3,3); *China Quarterly* (1,1); *Daedalus* (4,4); *Fletcher Forum of World Affairs* (1,1); *International Journal of Comparative Sociology* (3,3); *Journal of Policy Analysis and Management* (3,3); *Journal of Political Economy* (52,51); *Journal of Political Science* (8,7); *Journal of Social Issues* (2,2); *Journal of Social, Political and Economic Studies* (1,1); *Legislative Studies Quarterly* (3,3); *Middle East Journal* (2,2); *National Civic Review* (5,5); *Natural Resources Journal* (42,41); *Parliamentary Affairs* (2,2); *Philosophy & Public Affairs* (14,14); *Policy and Politics* (1,1); *Policy Studies Journal* (2,2); *Policy Studies Review* (1,1); *Political Quarterly* (1,1); *Political Science*

Quarterly (40,35); *Proceedings of the American Philosophical Society* (2,2); *Public Administration Review* (5,5); *Public Choice* (1,1); *Public Personnel Management* (1,1); *Social Forces* (3,3); *Social Research* (2,2); *Social Science Quarterly* (6,5); *Sociological Inquiry* (1,1); and *Washington Quarterly* (2,1). Dozens of journals have never been cited.

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Behind the veil: The rights of private individuals in the wake of *Hustler v. Falwell*

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Behind the veil:
The rights of private individuals in the wake of Hustler v. Falwell

Abstract

The primary theories of speech liability – libel, invasion of privacy, and infliction of emotional distress – have been so broadly applied and with such conflicting brushstrokes that even private plaintiffs have little recourse when the mass media sully their reputations or harm their peace of mind. Judicial tests have tended to turn on the idea of "publickness" – whether the speech is of public concern and whether the plaintiff is a public person. By focusing, in this tenth anniversary year, on the U.S. Supreme Court's decision in Hustler v. Falwell, this paper will argue that the courts have pushed an individual's right to a good reputation and to emotional tranquility so far into the shadows of publickness standards that modern plaintiffs find it almost impossible to recover from harm.

Introduction

In 1983, nationally known evangelist Jerry Falwell sued *Hustler* magazine for publishing an advertisement "parody," which, among other things, portrayed Falwell as "having engaged in a drunken incestuous rendezvous with his mother in an outhouse."[1]

The malicious satire was modeled after ads in which celebrities talked about their "first time" sampling a brand-name liquor, but they clearly conveyed the sexual double entendre. Publisher Larry Flynt admitted that his magazine, described by civil libertarian and Harvard law professor Lawrence H. Tribe as "a mix of eroticism, violence, and misogyny,"[2] published the self-described parody in order to assassinate the character of Jerry Falwell.[3]

In 1988, the U.S. Supreme Court determined that the Constitution protected the magazine from speech liability because Falwell was a public figure and, therefore, subject to media criticism. But another person was mentioned in *Hustler*'s message of incest: Helen Falwell, the minister's mother, and a private person. In point of fact, Helen Falwell could not have been defamed since she died five years before the publication of the November 1983 issue of the magazine, and no civil action may be brought for defamation of the deceased.

For purposes of this paper, however, which focuses on issues of "publickness" in claims against defamatory speech, Helen Falwell may be viewed as a symbol, representing a class of individuals who are private persons rather than public officials or public figures.

The U.S. Supreme Court historically has held that citizens should be free to criticize public officials and to debate public issues.[4] But the court continues to struggle to find the proper balance between a private individual's interest in a good reputation and emotional tranquility on the one hand and society's need for an open exchange of ideas and information on the other.[5] Similarly, courts traditionally have held, outright chauvinistically, that any imputation of a woman's sexual conduct is per se defamatory speech.[6] Yet, at the same time, the courts have cloaked pornography, which is centrally concerned with the portrayal and marketing of women as sex objects, in the protective absolutism of the First Amendment.[7]

What remedies exist for private individuals, particularly women, in actions against defamatory speech in the mass media? In the *Hustler* case,[8] the magazine criticized, lampooned and otherwise degraded, in the same communication, both a man known in the public sphere and a women of the private sphere. The satire, by definition a false or distorted picture of reality, was patently "vulgar, offensive, and shocking" and the kind of speech "not entitled to absolute constitutional protection under all circumstances."[9] Yet, Chief Justice William Rehnquist stated for the court that Jerry Falwell could not recover damages from *Hustler* because he was a public figure and, therefore, subject to "vehement, caustic, and sometimes unpleasantly sharp attacks."[10] The court did not address whether a private individual (Helen Falwell, had she been living) could recover damages for an outrageous depiction of her moral character.

Is outrageous speech aimed at private individuals as protected by the First Amendment as such speech aimed at public persons? Should outrageous speech aimed at private individuals be more worthy of recovery? To date, the courts have left these questions open; the possible answers are the central concern of this paper.

The thesis is a rather narrow one: The primary theories of speech liability – libel, invasion of privacy, and infliction of emotional distress – have been so broadly applied and with such conflicting brushstrokes that even private plaintiffs have little recourse when the mass media sully their reputations or harm their peace of mind.[11] Judicial tests have tended to turn on the idea of publickness – whether the speech is of public concern and whether the plaintiff is a public person. The more public the speech and the more public the person, the more First Amendment protection awarded to speech that harms.

By focusing, in this tenth anniversary year, on the U.S. Supreme Court's decision in *Hustler v. Falwell*, this paper will argue that the courts have pushed an individual's right to a good reputation and to emotional tranquility so far into the shadows of publickness standards that modern plaintiffs find it almost impossible to recover for harm.[12]

Background

In order to analyze the *Hustler v. Falwell* case, three intersecting areas of law and social history must be examined: the traditional law of defamation, women's historical relationship to defamation law, and the law of intentional infliction of emotional distress.

Traditional defamation law

In ancient Athens, in about the sixth century B.C., the reforms of Solon extended the right of free speech to all citizens. The designation "citizen," however, excluded women, males under 18 years old, resident aliens, and slaves – four groups comprising about 60 percent of the population. Nevertheless, the minority who did practice free speech understood that provisions existed to make orators personally responsible for what they said in public.[13]

The English, like the Greeks, controlled speech through law and prosecuted those found guilty of committing any of the four libels of common law: seditious libel, private libel (defamation), blasphemous libel, and obscene libel.[14]

The history of U.S. defamation law is a study of the conglomeration of Greek, Roman, and British law, and is made most bewildering by jurisprudence that, since the mid-1960s, seeks to divide the law along a line of publickness, making amorphous distinctions between public figures and private individuals and between issues of public concern and those of a purely private nature.

Since 1964, when the U.S. Supreme Court handed down its opinion in *New York Times v. Sullivan*,[15] courts have used vague and often-conflicting standards to determine speech liability, not only in claims for libel but also in claims for invasion of privacy and intentional infliction of emotional distress. Prior to the benchmark *New York Times* opinion, the common law's interest in protecting reputation required only that the plaintiff establish defamatory communication, i.e., that the plaintiff show that the defamation – defined as a statement that tends to hold a person up to hatred, contempt or ridicule – was intentionally communicated by the defendant to a third person.[16] The defamatory statement was viewed as false unless the defendant proved truth, and the issue of fault (the motivation of the defendant) was irrelevant. Yet the common law did not ignore the need for freedom of expression and developed "a complex structure of privileges [to protect] the societal interest in the free flow of ideas."[17] The defenses available to defendants in common-law libel actions included the privilege to accurately report public meetings and proceedings and the privilege of fair comment on matters of public concern. In addition, libel defendants could claim consent and truth as defenses.

Since the *New York Times* decision, which offered a constitutional privilege to media libel defendants in order to protect their right to publish and disseminate information of public concern, plaintiffs have found it increasingly difficult to recover damages for defamatory falsehoods. Proof of differing degrees of fault is now required; the determination of the degree of fault necessary turns on two factors: the plaintiff's status in the community and the nature of the speech itself, i.e., whether it is defined as public speech or private speech. In *New York Times*, the court held that a public official could not recover for libel unless he proved, with "convincing clarity," that the statement was made with "actual malice," that is, with knowledge that the statement was false or with reckless disregard of its truth.[18]

In later cases, the court expanded the actual-malice standard to include not only public officials (generally, those who have substantial responsibility within the government hierarchy) but also public figures, as held in *Gertz v. Robert Welch, Inc.*[19] Though marked with uncertainty and ambiguity, *Gertz* is significant for at least two reasons: First, the court required for the first time that private-figure libel plaintiffs show a minimum level of fault – negligence – in order to recover actual damages, as well as demonstrate actual malice in order to recover punitive damages. Some argue that the *Gertz* opinion lowered the level of protection for media defendants and extended protection to private individuals by NOT requiring plaintiffs to meet the actual-malice standard in libel actions. Others, such as Justice White in his dissent, suggest that *Gertz* radically changed the common law of libel, shifting the burden of proof to the private-figure victim, "even though he has done nothing to invite calumny, is wholly innocent of fault, and is helpless to avoid his injury."[20] Justice White wrote:

> To me, it is quite incredible to suggest that threats of libel suits from private citizens are causing the press to refrain from publishing the truth. I know of no hard facts to support this proposition, and the Court furnishes none. The communications industry has increasingly become concentrated in a few powerful hands operating very lucrative businesses reaching across the Nation into almost every home. Neither the industry as a whole nor its individual components are easily intimidated, and we are fortunate they are not. Requiring them to pay for the occasional damage they do to private reputation will play no substantial part in their future performance.[21]

A second factor judged necessary in finding a cause for action in defamation is whether the speech at issue is of public or private concern. The distinction was made in *New York Times* concerning speech about government and was expanded in later cases to include broader societal issues. In *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,[22] the court set about to structure a hierarchy of speech values in order to more clearly determine the weight of constitutional protection required to balance society's interest in wide-open debate against the three tiers of individual interest in reputation (public official, public figure, and private individual) set out in *Gertz*.

The *Dun & Bradstreet* court reasoned that the speech pyramid requires the strongest constitutional protection for speech of public concern at the apex and demands the least constitutional protection for speech of purely private concern at the base of the triangle. The judgment concluded that a private-figure plaintiff could recover presumed and punitive damages for defamatory falsehood, without a showing of actual malice, if the speech lay at the bottom of the speech pyramid, meaning that it was NOT a matter of public concern.

In dissent, four justices argued that the plurality opinion failed to explain what IS a matter of public concern and suggested that the credit-reporting function of Dun & Bradstreet "falls within any reasonable definition of 'public concern' consistent with our precedents."[23] Furthermore, the dissenters argued, even if the speech were not a matter of public concern, it would "fall well within the range of valuable expression for which the First Amendment provides protection."[24] In rebuttal, Justice Powell reasoned: "If the dissent were the law, a woman of impeccable character who was branded a 'whore' by a jealous neighbor would have no effective recourse unless she could prove 'actual malice' by clear and convincing evidence."[25]

In a more recent case, *Philadelphia Newspapers, Inc., v. Hepps*,[26] the court attempted to further distinguish public speech from private speech, holding that, contrary to common-law presumptions, the burden of proving the falsity of speech of public concern is upon the plaintiff, even when the plaintiff is a private individual. The court failed to determine two related issues, however: whether the burden (the standard of proof was undefined) also falls on the plaintiff when the speech is of purely private concern, or when the defendant is not defined as a representative of the mass media. It appears, then, that the only remaining category of speech not constitutionally protected by society's interest in uninhibited and robust debate is defamatory falsehood (statement of fact, not opinion), aimed at private individuals (those who do NOT thrust themselves into the vortex of public affairs or who are not pushed there involuntarily), concerning purely private matters (undefined).

Women and defamation

In the earliest Supreme Court case based on sex discrimination, the court upheld a statute denying women the right to practice law.[27] Later decisions upheld laws barring women from working more than 10 hours a day in the factory[28] and placing women on jury lists only if they made a special request.[29] All of these laws were aimed at limiting women to their traditional place in the home to discharge their wifely and maternal functions. In addition, the laws assumed that women had inferior capacities, classifying women with children and minors under protective statutes, for example.

Historically, the measure of a woman's cultural identity – and her reputation – has been tied to the "cult of domesticity." Bound to their homes by husbands and children, this ideology was reinforced by the church and by the law and served to exclude women or at least subordinate them to men in public life. It wasn't until 1971, seven years after the historic *New York Times v. Sullivan* decision, that the Supreme Court held, for the first time, that sex discrimination violates the equal-protection clause of the Fourteenth Amendment.[30] Two years later, in a similar ruling, the court stated: "[O]ur Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of 'romantic paternalism,' which, in practical effect, put women not on a pedestal, but in a cage."[31]

The idea of keeping women in cages, meaning their homes, lay at the core of the modern tort of imputation of unchastity to a woman, one category of slander per se. The rule, embodied in the Slander of Women Act in England and in state statutes in this country, holds that a verbal imputation of immorality to a woman is actionable without proof of damage and without regard to whether it charges a crime, such as adultery.

Women are largely invisible in defamation law. Developed from British law, the tort early on was used as a judicial replacement for the duel – a violent means of protecting a man's honor. The nature of the statements viewed as libelous – those that hold a person up to hatred, contempt, or ridicule in the community – clearly reveals the element of a gentleman's personal disgrace. Thus, it is defamatory on its face to say that a person committed a crime or has a loathsome disease, or to impute occupational or professional impropriety.

Most libel plaintiffs are persons of relatively elite standing in their communities, and most –70 percent – are men engaged in corporate or public life.[32] Libel actions, unlike other tort actions, usually are brought "by wealthy and powerful people who can afford the expense, time, and emotional stress of protecting their 'honor.'"[33] There may be several reasons why this is true. One is that the mass media either represent women in their culturally assigned domestic roles or don't represent them at all, lessening the opportunity for libel. Another is that women generally have less experience with the judicial system than men and lack financial resources that are necessary to continue litigation beyond the trial level. A third is that women may be socialized to be less adversarial than men are, and the adversarial relationship is central to the U.S. judicial system.

When women do step from behind the invisible barrier to demand recovery for harm to reputation or emotional well being, however, their actions inevitably seem to involve statements about or depictions of their sexual behavior.[34] At the same time, the judicial system treats women and men differently when they sue for reputational harm. Research indicates that two key patterns of difference are evident in defamation actions. Female plaintiffs tend to win actions based on accusations of immorality and to lose actions based on accusations injurious to their occupational status more often than male plaintiffs do. In addition, female plaintiffs tend to receive lower damage awards than do male plaintiffs.[35]

In the most celebrated libel action brought by a woman ever to reach the Supreme Court,[36] this pattern continued. Mary Alice Firestone won her case against Time, Inc., for harming her reputation through claims of immorality. Firestone, the third wife of the heir to the tire-company fortune, sued *Time* magazine for falsely reporting that her divorce from Russell Firestone was granted on grounds of her adulterous conduct. She recovered $100,000 in damages from the jury, whose judgment was affirmed by the Florida courts.

On appeal, Time, Inc. asked the Supreme Court to re-examine the actual-malice standard spelled out in *New York Times v. Sullivan* and the more detailed public figure/private figure rule enunciated in *Gertz v. Robert Welch, Inc.* and to declare Mary Firestone a public figure, subject to a showing of reckless disregard for the truth. The court rejected this contention and held that she was not a public figure because she did not assume a special role in the affairs of society and because she did not thrust herself into the forefront of a public controversy. The divorce proceedings, while of some interest to the public, could not be equated with a public controversy, the court reasoned.

But was Mary Firestone really just a private individual, a woman relegated to the private sphere of domesticity? In dissent, Justice Thurgood Marshall argued that she was indeed a public figure; she was prominent in her community, and she invited media attention by calling several press conferences during the course of her divorce trial. As a public figure, she should have been held to the same fault standard as other public people, Marshall argued, a showing of actual malice on the part of the defendant, *Time* magazine.[37]

Intentional infliction of emotional distress

Until the late 19th century, courts hesitated to recognize, as an independent cause of action, the upstart tort of intentional infliction of emotional distress. The reluctance resulted primarily from concerns about fictitious claims and a torrent of new cases and the fear that the damages would prove difficult to measure. Yet, according to Prosser, mental suffering is no more difficult to prove nor harder to estimate in terms of damages than physical injury.[38]

In addition, judges in early cases, many of which involved women who suffered physical harm, including miscarriages, as a result of mental trauma, scoffed at such lawsuits, primarily because such claims flew in the face of the cold, reasoned jurisprudence of the day. The prevailing view was that, when it came to coping with the trials and tribulations of daily living, "a certain toughening of the mental hide is a better protection than the law could ever be."[39]

Yet, judges did make exceptions.[40] If the plaintiff could show that the emotional harm was caused by some separate tort, such as assault, battery, false imprisonment, or seduction, she could recover damages. Gradually, the courts have extended the protection and have come to recognize severe emotional distress as an independent cause of action. The tort theoretically comprises four elements. The plaintiff must show that the defendant's conduct was intentional or reckless; that the conduct was extreme and outrageous; that the conduct caused the plaintiff's emotional distress; and that the emotional distress was severe. In practice, however, lawsuits tend to focus on just one of the elements – outrageousness of the defendant's conduct – since proof of that element often indicates evidence of the other three.

The imprecision of the outrageousness standard may have allowed a few lawsuits against the media to proceed. In the majority of emotional distress actions, however, most of which have been brought in the last 20 years, the media have prevailed.[41] Significantly, the tough demands of the tort's outrageousness requirement also accounted for most of the media's successes, and few cases ever reached the questions of the severity of the harm to the plaintiff or the fault standard necessary to prevail.

According to Dreschel, the cases can be classified into four categories: material that is thoughtless, tasteless, or insensitive; material that upsets the specific individuals involved; material that subjects those involved to physical harm or mental harassment; and material that is inaccurate but disappointing.

Some journalists have long believed that the publication or broadcast of the kinds of stories represented by these four classifications severely and substantially breach journalistic ethics. Yet, many also recognize that the tradition of journalism in the United States has bred contempt for the kind of sensitivity that would have discouraged such publications or broadcasts.

In speech-liability cases against the media, plaintiffs have begun to plead a trio of complaints – defamation, invasion of privacy, and intentional infliction of emotional distress. The cases that combined these claims almost tripled between 1977 and 1981.[42] There is substantial overlap in the interests protected by the three torts; for example, emotional distress is an element of damages in both defamation and in privacy. Such a blurring of the distinctions may indicate a movement toward one mega-tort that would join the torts together in "a single, integrated system of protecting the plaintiff's peace of mind against acts of the defendant intended to disturb it."[43]

In *Hustler v. Falwell*, the Supreme Court for the first time addressed the issue of whether speech-liability actions against the mass media for intentional infliction of emotional distress should enjoy the same high level of constitutional protection as defamation actions.

Analysis of the case

In November 1983, *Hustler*, a nationally circulated pornographic magazine, published a satirical imitation of an advertisement, which featured a photograph and an interview attributed to nationally known fundamentalist preacher Jerry Falwell. The magazine, owned by Larry Flynt, modeled the "parody" after a series of ads for Campari Liqueur, which employed celebrities to recall their "first time," referring to their first encounter with Campari but clearly conveying the obvious sexual double entendre.[44]

The ad, headlined, "Jerry Falwell Talks about his First Time," depicted Falwell, founder of the politically powerful Moral Majority, as a drunk, a hypocrite, foul-mouthed and "having engaged in a[n] incestuous rendezvous with his mother in an outhouse in Lynchburg, Virginia." Falwell's mother was portrayed as a drunken, ugly, slovenly whore. At the bottom of the magazine page was a disclaimer, which stated, "Ad parody – not to be taken seriously." The table of contents also listed the item as "Fiction; Ad and Personality Parody."

Shortly after the initial publication, Falwell brought a $45 million lawsuit in the U.S. District Court for the Western District of Virginia against Flynt, *Hustler* magazine, and the magazine's distributor. Falwell sued for libel, invasion of privacy under the Virginia code (appropriation), and intentional infliction of emotional distress. After notification of the lawsuit, Flynt republished the Falwell ad in the March 1984 issue of *Hustler*. Three months later, Falwell's counsel, Roy Grutman, questioned Flynt during a deposition, which contained the following passages:

Q. Did you want to upset Reverend Falwell?

A. Yes. . . .

Q. Do you recognize that in having published what you did in this ad, you were attempting to convey to people who read it that Reverend Falwell was just as you characterized him, a liar?

A. He's a glutton.

Q. How about a liar?

A. Yeah. He's a liar, too.

Q. How about a hypocrite?

A. Yeah.

Q. That's what you wanted to convey?

A. Yeah.

Q. And didn't it occur to you that if it wasn't true, you were attacking a man in his profession?

A. Yes.

Q. Did you appreciate, at the time you wrote "okay" or approved this publication, that for the Reverend Falwell to function in his livelihood, and in his commitment and career, he has to have an integrity that people believe in? Did you not appreciate that?

A. Yeah.

Q. And wasn't one of your objectives to destroy that integrity, or harm it, if you could?

A. To assassinate it.[45]

After hearing the evidence during the trial, which began in December 1984, the district court dismissed Falwell's invasion of privacy claim, finding that the parody did not satisfy the requirements for appropriation, the only privacy claim available in the Commonwealth of Virginia. The court then submitted the libel and intentional infliction of emotional distress claims to the jury.

Finding that no "reasonable man" could have believed that the parody was describing actual facts about Falwell (libel requires a false statement of fact), the jury dismissed the libel claim, and the court entered a verdict for the defendants. On the emotional distress claim, the jury returned a verdict against Flynt and *Hustler* magazine, awarding Falwell $100,000 in compensatory damages and $100,000 in punitive damages.[46]

Flynt appealed the judgment of the district court to the U.S. Court of Appeals for the Fourth Circuit. His attorneys raised two constitutional arguments. First, in a peculiar appropriation of libel law, they asserted that because Falwell was a public figure, he should have been required to meet the same actual-malice standard required of libel plaintiffs in order to recover damages for the claim of intentional infliction of emotional distress. Second, the defendants argued that because the jury found that no reasonable person could have believed that the Falwell ad stated actual facts, the parody was merely opinion and, therefore, absolutely protected by the First Amendment.

On the defendants' first contention, the Fourth Circuit agreed that Flynt and *Hustler* were "entitled to the same level of first amendment protection in the claim for intentional infliction of emotional distress that they received in Falwell's claim for libel." But the court refused to require a literal application of the *New York Times* standard – a showing of actual malice – for two reasons. First, the court concluded, the application of the actual-malice standard to an action for emotional distress would add a new element to the tort, i.e., a requirement of falsity, and therefore alter its nature. Second, the court concluded, the actual-malice standard – speech made with knowledge of falsity or with reckless disregard for its truth – focused on the culpability of the publisher rather than the truth or falsity of the statement. The court reasoned, therefore, that the tort of intentional infliction of emotional distress satisfied First Amendment concerns through its requirement of intentional and reckless conduct, and that Falwell had met that standard.

On the defendants' second contention, the Fourth Circuit recognized the importance of the distinction in defamation cases between fact and opinion but judged the distinction irrelevant in actions for emotional distress. Unlike libel, the court reasoned, the emotional distress tort concerns itself with reckless or intentional *conduct* that is outrageous and not "with *statements* [italics mine] per se."[47] In so reasoning, the court found, therefore, that outrageous statements, even opinions, could support a claim for emotional distress as easily as could any other outrageous conduct.

In affirming that Flynt and *Hustler* were liable for Falwell's emotional distress claim, then, the court judged that a public figure may recover damages from a media defendant and that the two stalwart standards constitutionally defined in defamation law – actual malice and privileged statements of opinion – did not apply. The defendants filed a motion for rehearing en banc; the Fourth Circuit denied the petition. The defendants then appealed to the U.S. Supreme Court.

The Supreme Court heard arguments in *Hustler v. Falwell* on Dec. 2, 1987, and issued its opinion on Feb. 24, 1988.[48] The court reversed the Fourth Circuit judgment, holding that the actual-malice standard applies not only in actions for libel but also in actions for intentional infliction of emotional distress.

The court focused its opinion on three constitutional issues: the limitations on public figures who seek remedy for emotional harm caused by the mass media; the distinction between facts and opinions; and the definitional boundaries of speech of public concern.

On the first issue regarding limitations on public figures, the court held that it was clear that Falwell was a public figure for purposes of First Amendment law and that neither side disputed that contention. As such, the court reasoned, Falwell's interests in emotional tranquility must be balanced against society's interests in the "free flow of ideas and opinions on matters of public interest and concern."[49] The court judged that the *New York Times* actual-malice standard was a valid requirement for emotional harm as well as reputational harm.

On the second issue regarding facts versus opinion, the court affirmed Justice Powell's dictum in *Gertz v. Robert Welch, Inc.*, which argued that the First Amendment recognizes no such thing as a "false idea," meaning that all opinion is constitutionally protected. In addition, the court stated its accord with the district court findings against Falwell on his libel claim, when the jury "decided that the *Hustler* ad parody could not 'reasonably be understood as describing actual facts about [respondent] or actual events in which [he] participated.'"[50] In other words, the court extended absolute constitutional protection to all forms of political cartoons, satires, parodies, and caricatures, where they involve public debate about public figures, regardless of their caustic nature or intent to harm the individuals portrayed.

On the third issue, defining matters of public concern, the court held that offensive speech, even such patently derogatory speech as was depicted in the *Hustler* parody of Falwell and his mother, is constitutionally protected and the outrageous nature of the speech does not distinguish it enough from traditional political cartoons to make it actionable.[51]

The court admitted that discourse on public affairs would suffer little harm if a standard could be devised that would separate the two kinds of speech. Yet, the court refused to create such a standard in the Falwell case, citing two reasons: First, requiring an element of outrageousness – at the core of an action for intentional infliction of emotional distress – would "[run] afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience."[52] Second, requiring an element of intent to cause injury – also an element in an emotional distress claim – would shatter precedent. "[E]ven when a speaker or writer is motivated by hatred or ill-will his expression is protected by the First Amendment."[53]

Thus, when the elements of outrageousness and intent to cause harm – central to the tort of intentional infliction of emotional distress – collided with the defamation standards set forth in *New York Times* and its progeny, the court gave preference to the actual-malice requirement and the constitutional protections it offers speech of public concern. The boundaries of such speech have been pushed outward to include not just speech that is offensive but also speech that is outrageous and whose intent is to destroy the emotional well being of the individual at whom it is directed.

The symbolic Helen Falwell

When the U.S. Court of Appeals for the Fourth Circuit denied Larry Flynt and *Hustler* magazine a rehearing in the *Falwell v. Flynt* case in 1986, paving the way for the Supreme Court appeal, one of the appellate court judges offered a lengthy dissent. Judge Wilkinson stated that permitting political figures to recover for emotional harm "surely will operate as a powerful inhibitor of humorous and satiric commentary and ultimately affect the health and vigor of all political debate."[54] As it turned out, the Supreme Court agreed with him.

Judge Wilkinson also suggested that the emotional distress tort has more validity in the private sphere than in the public sphere:

> The tort began in a case where a woman suffered serious and permanent injuries after a practical 'joker' told her to get two pillows to fetch her husband home because he was smashed up in an accident and had two broken legs [citation omitted]. . . . Though the tort of emotional distress has taken on new life in recent years, its extension to this case – to the very persons whose calling requires emotional strength and resiliency – is unwarranted. Indeed, to place the tort in the hands of political figures is to reject the rough-and-tumble that defines political life.[55]

By extension and innuendo, Judge Wilkinson seemed to suggest that a claim for emotional distress, historically used by women to recover damages for intrusions into their emotional and physical well being, should remain a cause of action defined by gender.

Defamation law exists in much the same way. Imputation of immorality against a woman has been a separate and distinct tort in defamation law since the 19th century and remains so in many states today.[56] Assault against either a woman's or a man's reputation carries legal consequences. But historically, reputational harm for women has been manifested most often by words spoken against their *private virtue* rather than their *public honor*. In 19th century New York, for example, the legislature added an act "to provide redress for words imputing unchastity to a female" to the state's code of civil procedure.[57] In the 20th century, the New York state legislature amended the unchastity statute, simplifying the language and deleting references that would distinguish between married and unmarried women. Nevertheless, the new law, like most across the country, remained strikingly similar to its 19th century counterpart, maintaining the cultural assumptions underlying its predecessor: that a woman's sexual virtue is her most highly valued reputational trait and a slur impugning female immorality carries legal consequences.

One study indicated that women win almost two-thirds of the defamation actions they bring for damage to their personal (sexual) selves, but lose 80 percent of the actions they bring for damage to their public (professional) selves. The study also indicated that even when women did win actions based on harm to their virtue, they won less money in damages than did men. This finding suggests that even a woman's most "valuable" socially constructed possession – her private chastity – is worth less than the male equivalent – his public honor.[58]

In the *Falwell v. Hustler* case, the Supreme Court did not address the issue of a separate emotional distress standard for private individuals. But if the court's logic were consistent, a private person would be required to meet a lesser standard of fault than a public person would. In *Hustler*, the court extended its application of the defamation standards handed down *in New York Times* and its progeny to the emotional distress tort. The court concluded that the First Amendment protects speech that is patently offensive, outrageous, and intended to inflict emotional injury if that speech is (1) defined as opinion; (2) of and concerning a public official or public figure; and (3) of and concerning an issue of public concern.

To distinguish the symbolic Helen Falwell from Jerry Falwell, each of these three constitutional tests for intentional infliction of emotional distress must be applied. In the first instance, as noted earlier, the *Hustler* court extended absolute constitutional protection to all forms of political cartoons, satires, parodies, and caricatures, *where they involve public debate about public figures, regardless of their caustic nature or intent to harm the individuals portrayed.* It is conceivable that the court would offer less protection to a parody that defamed the symbolic Helen Falwell than it did to her son because she would have been considered a private individual, but it is arguable whether the parody was about an issue of public concern (see discussion below).

Application of the second constitutional test – whether the speech is about a public figure – clearly distinguishes Jerry Falwell from the symbolic Helen Falwell. Had she been living at the time of the *Hustler* publication, Helen Falwell's only claim to publickness would have rested within the penumbras of her son's notoriety. She had done nothing to assume an influential role in the public eye.

Yet, application of a publickness standard to the tort of intentional infliction of emotional distress proves troublesome, since the categorizations of publickness in speech-liability law do not conform to one standard. In libel, an individual must voluntarily enter the public arena in order to be classified as a public figure; in invasion of privacy, an individual may be classified as a public figure if she is involuntarily drawn into the public eye. In the current discussion, neither classification would apply since Helen Falwell still would be categorized as a private individual.

Presumably, therefore, the high court would require for private individuals a lower level of fault than the actual-malice standard required of public plaintiffs in defamation cases. Yet, the courts often find elusive those elements used to define publickness.[59] In the meantime, the status-of-the-plaintiff test hopscotches erratically from tort to tort, from defamation to privacy to emotional distress, as if the same test – whether it is for reputational or emotional harm – can be applied to every action advanced against the mass media. For Helen Falwell and those she symbolizes, the court's decision to leave open the question of what level of fault is required for private individuals in emotional distress actions offers a quite slim basis for a claim.

Application of the third constitutional test – whether the speech is about a public issue – often is tied to the public-figure test but is distinguishable in at least two ways. In its attempts to broaden the definition of public speech, the court has held that, contrary to common-law presumptions, the burden of proving the falsity of speech of public concern falls upon the plaintiff, even when the plaintiff is a private individual.[60] Second, the court held in *Hustler* that offensive speech, regardless of its outrageous nature, is constitutionally protected if that speech is deemed of public concern. Such expansive protections for media defendants probably would have precluded Helen Falwell from successfully hurdling this constitutional test.

Conclusion

The relatively young tort of intentional infliction of emotional distress offers one of the few remaining actions available to private individuals who seek to recover damages for emotional and reputational harm caused by the publication of "opinion" in the mass media. The harm to the reputation and the emotional peace of mind of the symbolic Helen Falwell is every woman's harm. All women felt the sting of *Hustler* magazine's salacious and repugnant "parody" because the words published there were born of centuries-old sexism buried deep within the collective memories of the female psyche.

Yet how can it be said that the private individual's suffering is any more valid or deeply felt than that of a public person, who, in this case, was the primary target of the magazine's poison pen? Application of the *New York Times* standard to the tort of emotional distress only erodes even further the decades-long definitional battle over the concept of publickness and further muddies the very arbitrary and capricious distinctions the courts have made between public and private individuals and between public and private speech.

At one time, protecting one's reputation was at the heart of defamation law, and protecting one's peace of mind was at the heart of emotional distress law. Judicial application of the publickness standards enunciated in *New York Times* and its progeny has resulted in confusing ad-hoc balancing that gives an almost-absolute blanket of protection to the media.

While it is extremely important for the courts to be vigilant in assuring a free press, it is also important that an individual's right to his or her good name be given the utmost protection. The law's emphasis on the public status of the plaintiff rather than its historically forthright claim that reputational and/or emotional harm demand remedy requires careful scrutiny and revision. The courts must return to the core ideas embodied in defamation law and in the tort of emotional distress: People have a right to protect their reputations from defamatory falsehood and to protect their emotional peace of mind from scurrilous attacks by the media. Their recovery should not be held hostage to elusive and conflicting definitions of their public status.

In speech-liability law, what should matter is not whether the plaintiff is a man or a woman, a public person or a private one. Nineteenth century ideas about sex roles – that men are only to be seen as inhabitants of the public world of work and politics, to the exclusion of their sexual and moral selves, or that women are only to be seen as sexual inhabitants of the private sphere to the exclusion of their public selves – are outmoded social constructs. Efforts to reform defamation law need to be dusted off, and the migration of libel fault standards into the tort of emotional distress needs to be addressed. It is time for the courts to rebalance the scales of justice, tilting them back toward an equally important societal interest – the sanctity of individual human rights.

Notes

[1] Falwell v. Flynt, 797 F.2d 1270 (1986). The lawsuit named Larry Flynt, publisher; *Hustler* Magazine, Inc.; and Flynt Distributing Company, Inc., as defendants. Falwell brought suit for libel, invasion of privacy, and intentional infliction of emotional distress.

[2] LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 668 (1978).

[3] Falwell, 797 F.2d, at 1273.

[4] Fifty-four years ago, Justice Felix Frankfurter said that "[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures – and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation." Baumgartner v. United States, 322 U.S. 665, 673-74 (1944).

[5] In Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), the court attempted to distinguish recovery for defamatory speech among public officials, public figures, and private individuals, holding that even private individuals could not recover damages without a showing of fault (generally, negligence or actual malice) on the part of the defendant. Later cases extended that precedent, stating that a private person's interest in good reputation must succumb to society's need for open speech on matters of public concern. See Philadelphia Newspapers, Inc. v. Hepps, 106 S.Ct. 1558 (1986).

[6] (CITATION TO AUTHOR'S WORK OMITTED).

[7] While some obscene materials may not be protected by the First Amendment, the Supreme Court's vague standards clearly protect the pornography depicted in such magazines as *Hustler*.

[8] Hustler v. Falwell, 108 S.Ct. 876 (1988).

[9] Id., at 882 [quoting FCC v. Pacifica Foundation, 438 U.S. 726, 747 (1978)].

[10] See New York Times v. Sullivan, 376 U.S. 254, 270 (1964). This case, which involved a political advertisement critical of the official conduct of a public official in Alabama, was the first to constitutionalize defamation law. In holding for the newspaper, the court embraced the Meiklejohnian theory that speech of public concern was of the highest importance under the First Amendment.

[11] See RANDALL P. BEZANSON ET AL., LIBEL LAW AND THE PRESS (1987); Marc A. Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 AM. B. FOUND. RES. J. 455; and Marc A. Franklin, *Suing the Media for Libel: A Litigation Study*, 1981 AM. B. FOUND. RES. J. 797.

[12] While both invasion of privacy and pornography are worthy of detailed study, they are beyond the scope of this paper. In the Hustler v. Falwell case, the issue of pornography was not raised, and the trial court dismissed Falwell's claim for privacy.

[13] "The original code of laws. . . contained a provision to prevent tampering with the laws, namely that the person wishing to propose an amendment of an existing law must speak with his head in a noose; if. . . failed to convince, the noose was tightened instantly and the complainant was strangled." K. FREEMAN, GREEK CITY-STATES 35 (1950).

[14] "[G]uilty parties were summoned, examined, and tried in a summary fashion; their criminal publications were burned by the hangman at the order of the house, the party humiliated, usually on his knees, and forced to pay

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costs." LEONARD LEVY, FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY: LEGACY OF SUPPRESSION 5 (1963).

[15] 376 U.S. 254 (1964).

[16] "Historically, the individual's interest in the enjoyment and maintenance of a good reputation has been regarded as so socially significant that both English and American law have protected the reputational interest by holding one who intentionally published defamatory material to a standard of strict liability or liability without any consideration of fault." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §111 (5th ed. 1984), at 804.

[17] Id.

[18] New York Times, 376 U.S., at 286-87 and 279-80.

[19] 418 U.S. 323 (1974). Elmer Gertz, an attorney retained to represent the family of a youth killed by a Chicago police officer in 1968, was a private individual drawn into a public campaign by the John Birth Society to publicize an alleged nationwide conspiracy to discredit local police. The society's magazine, *American Opinion*, published a story critical of Gertz, portraying him as a "major architect" in the conspiracy and falsely asserting that he was an official of the Marxist League, a Leninist, and a "Communist-fronter." Id., at 325-26.

[20] 418 U.S., at 390.

[21] Id., at 390-91.

[22] 472 U.S. 749 (1985).

[23] Id., at 789. The dissenters were Justices Brennan, Marshall, Blackmun, and Stevens.

[24] Id., at 790.

[25] Id., at 762, footnote 7.

[26] 475 U.S. 767 (1986).

[27] Bradwell v. Illinois, 83 U.S. 130 (1871). In ruling against Bradwell, the court stated: "The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. . . . The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator." Id., at 141.

[28] Muller v. Oregon, 208 U.S. 412 (1908).

[29] Hoyt v. Florida, 368 U.S. 57 (1961).

[30] Reed v. Reed, 404 U.S. 71 (1971). The court judged that a law preferring men to women in a job as an estate administrator was unconstitutional.

[31] Frontiero v. Richardson, 411 U.S. 677 (1973). The court held that a federal statute – allowing men in the armed forces an automatic dependency allowance for their wives but requiring women in the armed forces to prove that their husbands were dependent – was unconstitutional.

[32] Franklin, *Winners and Losers*, at 493.

[33] LOIS FORER, A CHILLING EFFECT 52 (1987).

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[34] (CITATION TO AUTHOR'S WORK OMITTED).

[35] Id.

[36] Time, Inc. v. Firestone, 424 U.S. 448 (1976).

[37] Id., at 485 (Marshall, J., dissenting).

[38] "As all pain is mental and centers in the brain, it follows that as an element of damage for personal injury the injured party is allowed to recover for actual suffering of mind and body when they are the immediate and necessary consequence of the negligent injury." PROSSER AND KEETON, at 55, footmote 5.

[39] Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033, 1035 (1936).

[40] In the watershed case, Wilkinson v. Downton (1897) 2 Q.B. 57, the defendant, as a practical joke, told the plaintiff that her husband had suffered a serious accident and had broken both of his legs. The statements were not true, but believing them to be, the plaintiff went into shock. The court allowed her to recover damages.

[41] Robert E. Dreschel, *Intentional Infliction of Emotional Distress: New Tort Liability for Mass Media*, 89 DICK. L. REV. 339 (1985).

[42] Terrance C. Mead, *Suing the Media for Emotional Distress: A Multi-Method Analysis of Tort Law Evolution*, 23 WASHBURN L.J. 24 (1983).

[43] Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093 (1962), at 1124-25.

[44] The text of the ad read as follows:
Falwell: My first time was in an outhouse outside Lynchburg, Virginia.
Interviewer: Wasn't it a little cramped?
Falwell: Not after I kicked the goat out.
Interviewer: I see. You must tell me all about it.
Falwell: I never really expected to make it with Mom, but then after she showed all the other guys in town such a good time, I figured, "What the hell!"
Interviewer: But your mom? Isn't that a bit odd?
Falwell: I don't think so. Looks don't mean that much to me in a woman.
Interviewer: Go on.
Falwell: Well, we were drunk off our God-fearing asses on Campari, ginger ale and soda – that's called a Fire and Brimstone – at the time. And Mom looked better than a Baptist whore with a $100 donation.
Interviewer: Campari in the crapper with Mom. How interesting. Well, how was it?
Falwell: The Campari was great, but Mom passed out before I could come.
Interviewer: Did you ever try it again?
Falwell: Sure. . . lots of times. But not in the outhouse. Between Mom and the shit, the flies were too much to bear.
Interviewer: We meant the Campari.
Falwell: Oh, yeah. I always get sloshed before I go out to the pulpit. You don't think I could lay down all the bullshit sober, do you?
-- *Hustler* magazine, November 1983.

[45] 797 F.2d at 1273.

[46] During the trial, Falwell testified that the *Hustler* ad made him angry and hurt and diminished his capacity to run his business. "I think I have never been as angry as I was at that moment. . . . My anger became a more rational and deep hurt. I somehow felt that in all my life I had never believed that human beings could do something like this. I really felt like weeping." Id., at 1276.

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[47] Id., at 1275. Unlike the later decision handed down by the U.S. Supreme Court, the Fourth Circuit did not buy the defendants' opinion-versus-fact argument. "We need not consider whether the statements in question constitute opinion, as the issue is whether their publication was sufficiently outrageous to constitute intentional infliction of emotional distress." Id.

[48] 108 S.Ct. 876 (1988).

[49] Id., at 879.

[50] Id., at 882.

[51] In a rather distasteful pun about the incestuous theme of the ad, Justice Rehnquist wrote: "There is no doubt that the caricature of respondent and his mother published in *Hustler* is at best a distant cousin of the political cartoons described above, and a rather poor relation at that." Id.

[52] Id., at 882.

[53] Id., at 880-81.

[54] Falwell v. Flynt, 805 F.2d 484 (4th Cir. 1986) [en banc], at 484.

[55] Id., at 486.

[56] (CITATION TO AUTHOR'S WORK OMITTED).

[57] Law of March 29, 1871, ch. 219, §1, 1871 New York Laws.

[58] AUTHOR, at 136.

[59] Compare, for example, Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), Associated Press v. Walker, 388 U.S. 130 (1967), and Time, Inc. v. Firestone, 424 U.S. 448 (1976).

[60] See Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986).

WHEN NEWS ARTISTS TAKE WITHOUT ASKING:
DIGITAL PHOTO COLLAGE AS TRANSFORMATIVE COMMENTARY

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ABSTRACT

This article explores the copyright implications for news publications when news artists sample and distort protected news photos in digitally created photo collages. The rights of the photographer and the rights of the news publication are examined in a hypothetical case involving a photo collage created by the author. The author first explores digital sampling in the collage in light of the substantial similarity test. Several samplings are examined, each progressively more significant, to determine the threshold of infringement. One of the samplings in the collage is then analyzed under the four factors of fair use. Ultimately an argument is made for fair use of copyrighted news photos by news publications in photo collages. Using his experience as a newspaper artist, the author provides guidelines for news artists in creating illustrations which borrow from photos.

When News Artists Take Without Asking:
Digital Photo Collage as Transformative Commentary

INTRODUCTION

In a newsroom of a large metropolitan daily newspaper, a nervous editor leads a small meeting which includes a reporter, a photographer and an artist, all of whom have been working on a special analysis section on President Clinton's growing ethical problems. With only a couple of days until the pages hit the press, the editor finds herself with no appropriate lead art for the project. The photographer has not produced shots that encompass the package's theme. None of the "straight-news" wire photos serve the purpose either, and the editor does not want to assign a drawing because she wants a real-world feel to the art. "How about a photo collage?" asks the artist. He suggests combining representative photographic images of the president's ethically troubled past with a distorted news photo of Clinton. The photographer retorts that the photo department has its own ethically troubled past in the area of photo manipulation, and that there could also be legal troubles from borrowing photos for collages.

The editor would rather have a strong staff photo — but the right one hasn't been found, and time is running short. Her superiors are placing increasing emphasis on design and visual imagery, and the editor feels this pressure to make the lead art "work." She assigns the illustration to the art department and moves on to her next project. The artist begins to assemble photos from archives and wire agencies. Running behind on deadline, he can't find some of the photo images he considers crucial to his collage. At the last minute he scans the images out of a news magazine and places them into the illustration. The page is assembled, and the section goes to press.

A few weeks later the project's editor receives an e-mail from an anxious managing editor: "I have a letter from the lawyers of a photo agency. They're representing the free-lancers who shot several of the photos in our Clinton collage — they're suing the paper for copyright infringement."

The newsroom environment in this situation is hypothetical, but typical.[1] The combination of deadline pressures, a growing emphasis on visuals in news publications, and powerful computer graphics technology has resulted in a surge in the number of digitally manipulated photo collages. Add to the mix the absence of copyright rulings in the area of digital image borrowing, and it's not hard to see trouble ahead. This article is an attempt to help editors avoid legal trouble by clarifying ambiguities involving the unauthorized borrowing of copyrighted news photos for digital collage.

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[1] The author draws on personal experience as a newspaper photo illustrator and page designer for some of these hypothetical details.

Computers did not give birth to the photo composite[2], but there is no doubt that digital technology has increased the pace of photo manipulation. Digital photo illustrations are quick and relatively easy[3], and of course newspaper deadlines demand speed. and when and there are more photo illustrations. A count of the Society of Newspaper Design's award winning feature pages reveals an increase in pages displaying manipulated photos — from 3 percent in 1990 to 33 percent in 1996.[4] There are also more photos being scanned into digital databases by stock photo agencies and news services.[5] Artists can download photos from the Internet or from electronic photo services and seamlessly alter them with image manipulation programs like Adobe Photoshop. It is no wonder that free-lancers and photo agencies are becoming increasingly concerned over the integrity of their photos.

Technology is not the only reason photo collages have proliferated. Today's editors expect

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[2] In 1864, a darkroom technician superimposed Abraham Lincoln's head on a portrait of John C. Calhoun's body. In the 1920s, when reporters of the New York Evening Graphic were ejected from a courtroom, newsroom staff members posed as participants, and artists composed a fake image from 20 separate negatives. Lester, *Photojournalism: An Ethical Approach* 97, 104 (1991).

[3] Fred Ritchin, *In Our Own Image: The Coming Revolution in Photography* (New York: Aperture Foundation, Inc., 1990), 27-30.

There are many ways to digitally manipulate photo images. Photos may be stretched or otherwise distorted, pieced together with other photos (or pieces of photos) for a collage, or they may be altered in color or shade. When a digital photo is scanned into computer memory, the visual information is translated into a series of 0's and 1's (meaning the electronic current is either pulsing or not). This information is translated into "pixels," which are tiny square geographic areas that contain color or other visual characteristics. The screen displays the pixels — one photo may be made up of thousands of pixels — so to the naked eye, there is a smooth continuum of shade. The pixels can be given new information (color, intensity, sharpness) and thereby altered.

[4] Society of Newspaper Design Award Annuals, (1990, 1996).

[5] Black Star, one of the largest stock agencies for news photos, has thousands of digitized photos with more being scanned in every day. News services like Knight-Ridder Tribune and New York Times News Service also offer digital photo databases.

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visually attractive pages with visually interesting images, and yet editors are also emphasizing stories that interpret, investigate and analyze.[6] Such stories are difficult to illustrate with straight news photos. As in our hypothetical situation at the metropolitan daily, a news analysis treats a real issue in a conceptual manner. In such a situation, artists need a way to blend the concreteness of photos with the non-literal nature of illustrations. In short they need the photo collage. Editors (who make art assignments) also recognize the advantages of photo collaging for conceptual stories. A 1995 survey of 677 showed that news editors embrace photo illustrations and digital manipulation for "feature" photos.[7]

Some art directors and editors, however, perceive a loss of quality in these digital techniques. Tony DeFeria, assistant managing editor for photo and graphics at the Atlanta Constitution, says next year he plans to limit the number of photo illustrations created in his department: "I think there's a little too much photoshopping going around these days — it's an easy out."[8] Editors and art directors have also had ethical qualms about the medium.[9] One study found a consensus among 511 photo editors at daily newspapers against photo manipulation of any kind.[10] Yet photos continue to be manipulated — in the Dec. 2, 1997 issue of Newsweek, the crooked teeth of septuplet parent Bobbi McCaughey were digitally straightened and whitened for the cover shot.[11]

With this increase in photo manipulation and digital photo databases it is likely that a copyright infringement suit over a digitally altered photo will be litigated. One such case almost came to court in 1994 but was settled. Newsday agreed to pay FPG International, a photo licensing agency, a retroactive licensing fee of $20,000 for the appropriation of one of FPG's stock photos in a digitally composed photo illustration. The suit was filed to take a stand for photographers' rights in today's digital environment, but FPG found the case to be less than ideal for the purpose. FPG's lawyers feared they would have the burden of proving the infringement had been made with "willful negligence." Newsday settled because it was clear the copying was unauthorized, and it was the publication's policy to pay licensing fees when appropriate. Newsday's lawyers argued that new technology was irrelevant to the case — they said the copying could have been accomplished by cutting and pasting.[12] FPG's president disagreed, arguing that image theft was much easier to control before digital scanners, when original transparencies were necessary for printing.[13]

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[6] David H. Weaver and G. Cleveland Wilhoit, *The American Journalist in the 1990s: U.S. News People at the End of an Era* (Mahwah, New Jersey: Lawrence Erlbaum Associates, Inc., 1996), 137-38.

[7] Reaves, *The Vulnerable Image: Categories of Photos as Predictor of Digital Manipulation*, 72 JOURN. Q. 713 (1995).

[8] Interview with Tony DeFeria.

[9] *See generally*, Harris, *Digitization and Manipulation of News Photographs*, 6 J. MASS MEDIA ETHICS 165 (1991).

[10] Reaves, *supra* note 7 at 152.

[11] *Light of the Dark*, The Atlanta Journal, D2 (Nov, 1997).

While courts have not clarified copyright law regarding photo sampling, several scholars have offered their opinions in law journals. Most of these articles either defend the moral integrity of the photographer's work[14] or the expression of the collage artist's work. Tomlinson and Harris express concern that while news photos are copyrightable expression, such photos may be seen by courts as "representation of facts." The value of representations of facts "is generally attributable to the labor they embody rather than their mode of expression."[15] Oberman and Lloyd argue that while a photographer would own the copyright to a photo within a distorted derivative work, it may be difficult to show copying because the image would be difficult to recognize.[16] Scholars defending the collagist say that collages enrich artistic expression and provide social criticism. Krieg and Sullivan argue that collagists should be able to incorporate copyrighted "quotidian" photos without legal concerns, and that courts must clarify the legal ambiguities that chill freedom of speech interests.[17] Peral urges a fair-use defense for collage because copyrighted images produce political and social commentary.[18]

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[12] Walker, *Newsday, FPG Settle Copyright Infringement Dispute*, PHOTO DISTRICT NEWS (Jan., 1995), 24,26.

[13] Busch, *Stock and Security: FPG vs. Newsday*, Print (March 1994), 48.

[14] "In recognition of their link more to the author's personality than pocketbook, moral rights stand in contrast to economic rights." (M. NIMMER & D. NIMMER, *infra* note 46 § 8D.06). Moral rights protect artists from injury to reputation due to mutilation or modification of their work. (17 U.S.C. § 106) Under U.S. copyright laws moral rights do not apply to everyday news photography. They only apply to photography "produced for exhibition purposes." (17 U.S.C. § 101)

[15] Tomlinson and Harris, *Free-Lance Photojournalism in a Digital World: Copyright, Lanham Act and Droit Moral Considerations Plus a Sui Generis Solution*, 45 FED. COM. L. J. 31. Citing Gorman at note 167. (1992).

Our hypothetical case: A photo collage

Reportedly, in the Newsday case, Newsday's lawyers had been prepared to argue fair use.[19] If lawyers for the metropolitan daily in our hypothetical case were to argue fair use, would they likely be successful? This article will look for an answer to this question by exploring the likelihood of copyright infringement and fair use for a hypothetical photo collage (at end of article, fig. 1). This collage is typical of its genre, and the photo samplings have been selected to highlight particular legal concerns over digital copying. Subjecting this collage to the infringement and fair-use tests, the author concludes that, as long as the sampling contributes to transformative commentary in the new work, news artists are not likely to violate copyright when engaging in unauthorized sampling of news photos for collages.

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[16] *See generally* Oberman and Lloyd, *Copyright Protection for Photographs in the Age of New Technologies*, 2 B.U. J. SCI. & TECH. L. 10 (1996).

Oberman and Lloyd also hold that the act of scanning a copyrighted photo without authorization is an act of copyright infringement — regardless of whether the copy is ever reproduced. They suggest that such scanning is "intermediate copying." The Ninth Circuit in ***Walker v. University Books, Inc.*** used this term to describe a copy which is a middle step on the way to a final product. The ***Walker*** court held that the plaintiff's copyright on fortune-telling cards could be infringed by the defendant's blueprints for cards that had not yet been produced. Oberman and Lloyd say this ruling is useful to the free-lancer whose photo has been distorted to the point of unrecognizability in a derivative work.Under ***Walker***, they say, it is irrelevant that evidence of copying is non-existent in the derivative work. If the free-lancer has evidence of the intermediate scanning (albeit, difficult evidence to come by), infringement can be found. *See* Walker v. University Books 602 F.2d 859 (1979).

[17] Krieg, *Copyright, Free Speech and the Visual Arts*, 93 YALE L. J. 1568 (1984). Sullivan, *Copyright for Visual Art in the Digital Age: A Modern Adventure in Wonderland*, 14 CARDOZO ARTS & ENT L. J. 622.

[18] Peral, *Using Copyrighted Visual Works in Collage: A Fair Use Analysis*. 54 ALB. L. J. 153 (1989).

[19] Busch, *supra* note 13 at 24,26.

The collage is a work critical of President Clinton's ethics. The artist has sampled three free-lance news photos without authorization. Each of the three samplings is slightly different in qualitative and quantitative significance, and by comparing them the author addresses the question of how much digital sampling is too much. The first borrowing is of a tiny fragment — an ear — from a photo of Clinton (the "Clinton ear" photo). The second borrowing is a slightly larger fragment — Clinton's chin, mouth and nose — from another photo (the "Clinton mouth" photo). The third borrowing is of the complete body and head of Clinton from a photo of Clinton holding a saxophone (the "Clinton saxophone" photo). This third borrowing, although more extensive, is difficult to identify because the artist has digitally distorted the Clinton saxophone fragment.

Citing cases involving digital sampling of music, the author argues that the borrowing of the ear fragment does not infringe because the ear is not qualitatively important to the original photo. The borrowing of the Clinton mouth fragment does infringe because this fragment is close to the core of the original photo's expression. The borrowing of the Clinton saxophone photo is quantitatively more significant than the borrowing of the ear and mouth fragments and therefore infringes. However, the artist has transformed the Clinton sax photo through digital manipulation, and its new transformative nature is the cornerstone for a successful fair-use argument.

DOES THE COLLAGE INFRINGE?

The first step in examining our photo collage is to determine if it, as a derivative work, infringes the copyright of the appropriated photos. If it does not infringe, a fair-use argument is unnecessary. Copyright law defines a "derivative work" as "a work based upon one or more pre-existing works...in which a work may be recast, transformed or adapted...or ...consisting of editorial revisions, annotations, elaborations or other modifications which, as a whole, represent an original work of authorship."[20] The

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[20] 17 U.S.C. § 101

Clinton collage is a derivative work because it transforms and recasts the sampled photos,[21] but the creators of the sampled photos maintain the copyrights in their photos.[22]

The photos were appropriated for use in the derivative collage without authorization, and therefore infringement may be argued. For the plaintiff free-lance photographers to prove infringement against the defendant news publication, they must show ownership of valid copyrights and that the defendant copied without authorization.

For an image to be copyrightable, it must be "fixed" in a tangible medium of expression. Courts have ruled that entering information into the random access memory of a computer sufficiently fixes the image.[23] Also to be copyrightable, an image must display a modicum of intellectual effort. Even the most basic photo snapshots have been ruled to possess a modicum of intellectual effort. In *Bleistein v. Donaldson Lithographing Co.*, Justice Holmes said "the least pretentious picture has more originality in it than directories and the like, which may be copyrighted.[24] It may be assumed then, that all three sampled photos in our hypothetical case are copyrightable and that the photographers own the copyrights.

It must next be determined that copying occurred. Two criteria must be met. 1) a defendant must have access to a plaintiff's work, and 2) the photograph and the derivative work must be substantially similar.[25]

1. Is there access to the plaintiff's photo?

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[21] The illustrations could also be seen as "collective works." A collective work is formed by composing pre-existing copyrighted materials into a product which "as a whole constitutes an original work of authorship." The photographer would maintain his copyright in a collective work. (17 U.S.C. § 101)

[22] It also follows that: "Copyright protection in a derivative work or compilation does not extend to the part of the work which is used unlawfully." (17 U.S.C. § 101) In the Clinton illustration, because of the severe distortion and intertwining elements, it might be difficult to separate lawfully used parts from potentially unlawfully used parts.

[23] MAI Sys. Corp. v. Peak Computers Inc., 991 F.2d 511, 519.

[24] Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 250 (1903).

[25] Leibovitz v. Paramount 948 F. Supp. 1218 (S.D.N.Y. 1996).

The first criterion — defendant having access to plaintiff's work — is a moot point in the cases involving the Clinton collage and the Clinton ear and mouth photos, because the digital sampling is literal. However, the plaintiff in the case of the Clinton collage and the Clinton sax photo would likely have to address this criterion.The artist has severely distorted the sax photo, and therefore the copying, although literal, is difficult to see. In such a case, the plaintiff could help his case by proving access through evidence of the defendant's downloading or scanning. The plaintiff might find evidence of the original photo in the artist's hard drive or external disks, a newspaper file server or the newspaper's main back-ups. The plaintiff could also show access if the photo were available on the Internet, or on a digital database to which the paper subscribed.[26]

2. Is there substantial similarity?

The second criterion is the extent of the copying — the photograph and the derivative work must be substantially similar. It is in the analysis of substantial similarity that the court looks for a threshold of likeness — how much digital sampling is too much? Cases involving digital sampling in music shed some light on this question.

In music sampling cases, even a small digital sampling can be seen as substantial copying because, as copyright scholar Melville Nimmer says, the borrowing has literal similarity to the original work: "To the extent that the resulting product is substantially similar to the sampled original, liability should result."[27] In *Grand Upright v.Warner Brothers* the judge found the sampling of three words and a portion of a copyrighted song to be "not only a violation of the seventh commandment ['Thou shalt not steal'] but of the copyright laws of this country."[28] In *Jarvis v. A&M Records*, the judge denied a defense motion for summary judgment for fact-finding on the issue of whether sampled song portions were significant enough to be substantially similar. The defendant rap group digitally appropriated three phrases and a distinctive keyboard riff from another song.[29] The *Jarvis* court did not rule on the sampling but did indicate that after fact finding, a finding of infringement would not be unlikely.[30] The court said, "there is literal verbatim similarity between plaintiff's and defendants's works ... the copied parts could not be more similar." The Jarvis court stated that for sampling to be infringing, the similarity between the songs would have to be detectable to a "lay audience." Also, the court said, infringement can devalue a work even if only a small portion is copied, if the portion is "of great qualitative importance to the [sampled] work as a whole."[31]

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[26] Playboy Enterprises, Inc. v. Starware Publishing Corp., 900 F. Supp. 433 (1995). District court finds infringement in digital appropriation and distribution (on CD-ROMs) of Playboy photos acquired over the Internet.

[27] MELVIN NIMMER & DAVID NIMMER, Nimmer on Copyright § 13.03.

[28] Grand Upright Music Limited v. Warner Brothers Records, Inc., 780 F. Supp. 182, 183 (1991).

The recent case of *Ringgold v. Black Entertainment Television* , which involved literal copying (although not digital sampling) of a visual work, is also relevant to our hypothetical cases. This case involved the unauthorized appropriation of a silk-screen painting for the set in the scene of a television sitcom. The defense argued that the use of the painting was *de minimis*, but the court disagreed and found substantial quantitative and qualitative similarity in the copying. To test for quantitative similarity, the court measured the amount of time the painting was visible to viewers — 26.75 seconds — and noted that for four or five seconds about 80 percent of the painting was visible. In analyzing qualitative similarity (the copying of the expression of the piece) the court noted that the image appeared fuzzy, but that the average lay observer ("lay audience" in Jarvis) would still be able to discern the distinctive, colorful style and the African-American characters.[32]

How would these cases impact a court's analysis of substantial similarity in our hypothetical cases? In the music sampling cases, courts have required only small fragments of copying to find infringement. In the Clinton illustration, the appropriated ear fragment is tiny and is not central to the expression of the Clinton ear photo. Applying the reasoning of the *Jarvis* court, it is doubtful that a lay reader would find the sampling of the ear to be "of great qualitative importance" to the Clinton ear photo.[33] Using the *Ringgold* analysis, it is doubtful that a court would find quantitative similarity between the tiny ear fragment in the Clinton collage and the ear in the sampled photo: the ear appears to be about one percent of the area of the Clinton ear photo.

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[29] Boyd Jarvis v. A&M Records, 827 F. Supp. 282, 291 (S.D.N.Y., 1993).

[30] The court says, "It is certainly not clear as a matter of law that the portions copied from plaintiff's song were insignificant to plaintiff's song. To the contrary, the [phrases] occur in a bridge that attempts to be distinct and attention-grabbing." *Jarvis*, 827 F. Supp. at 292.

[31] *Jarvis*, 827 F. Supp. at 291.

[32] Ringgold v. Black Entertainment Television Inc., 25 Med. L. Rptr. 2387, 2393 (2d Cir. 1997).

However, the sampling of the Clinton mouth photo shows substantial similarity. Quantitatively, the sampling is only a little larger than the sampling of the Clinton ear photo. However, the *Ringgold* court fastidiously scrutinized quantitative similarity (measuring time to one-hundredths of a second), and so a court applying similar scrutiny may find similarity in the copying of the mouth photo that it would not find in the copying of the ear photo. If the Clinton mouth photo were a wider shot, perhaps including other people, the mouth fragment would be less quantitatively significant. There is, without a doubt, qualitative similarity between the Clinton mouth photo and the mouth fragment in the collage. The facial expression indicated by the mouth fragment is of qualitative importance to the Clinton mouth photo, and there is precedent for courts giving special consideration to "facial expression" in copyright cases.[34] This does not mean that a sampled mouth fragment would always be viewed as qualitatively significant to the original photo. One could imagine a mouth with a neutral expression that would be less qualitatively important to a sampled photo.[35]

In the case involving the Clinton saxophone photo, the artist has certainly sampled enough of the photo for a court to find substantial similarity. The artist has in fact borrowed most of the composition of the original photo, and composition, or "visible form" as Justice Holmes calls it, is important to the creative expression of the work.[36]

Has the artist of the Clinton collage distorted the Clinton saxophone photo to such a degree that a court would fail to find substantial similarity? Probably not. The discussion in *Ringgold* of the painting appearing fuzzy and out-of-focus is germane to the Clinton saxophone fragment being digitally distorted in the Clinton collage. Despite the fuzziness, the *Ringgold* court ruled that a lay reader would discern qualitative similarity between the actual painting and its appearance on the sitcom. It would perhaps be somewhat more difficult for a lay reader to discern similarity between the Clinton sax photo and the collage's Clinton sax fragment — the distortion is more severe than being out-of-focus. Despite the distortion, however, it is still possible to see tiny pieces exactly copied (Clinton's left eye and the saxophone itself, for example). Because the copying is literal, it is easier to detect similarity in fragments. It is likely that a lay observer would discern the similarity, and the court would not rule the sampling to be *de minimis.* [37]

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[33] *Jarvis*, 827 F. Supp. at 291.

[34] *Leibovitz*, 948 F. Supp. at 1214, 1224.(facial expression in the photograph of a pregnant Demi Moore is important to the expression of the work.) Little Souls, Inc. v. Les Petits 789 F. Supp. 56, 58 (1992), (an "identifiable look" in dolls is due to "principally the expressions on their faces.")

[35] Hennon v. Kirklands, Inc. 870 F. Supp. 118 (1994) (the facial expression of caroler figurines are not unique because of the popular convention of portraying carolers angelically singing.)

[36] Burrow-Giles v. Sarony 111 U.S. 53, 60 (1884).

A court, then, would find substantial similarity in the sampling of the Clinton saxophone photo (the largest sampling) and the Clinton mouth photo (the next largest sampling). It does not appear that the smallest amount of sampling — that of the Clinton ear photo — is substantial enough to be infringing, and we will therefore depart from this case. Defendants would next argue fair use of these photo fragments. For the sake of simplicity and clarity, we will also depart from the sampling case involving the Clinton mouth photo and focus the fair-use test on the sampling of the Clinton saxophone photo. This sampling in particular brings up concepts peculiar to the fair-use analysis — e.g., whether the derivative work is transformative, and whether the defendant has copied in good faith.

FAIR USE

Fair use has been defined as "a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner of the copyright."[38]

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[37] While theoretically, an artist can easily distort a photo beyond possible recognition, such complete distortion would be rare. This is because such distortion makes the unauthorized copying pointless, from the artist's viewpoint. In digital photo collage, an artist "samples" a photo because he sees something he likes in at least a fragment of the photo, and it naturally follows that he would want to display this fragment (the eye for example) in his final work. (From the author's experience as a newspaper photo illustrator.)

Section 107 of the 1976 Copyright Act is the first codified version of fair use. The preamble to the section cites six purposes of fair use: criticism, comment, news reporting, teaching, scholarship and research. The act lists four factors for courts to weigh in determining if a use is fair: (1) The purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purpose, (2) The nature of the copyrighted work, (3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole, and (4) The effect of the use upon the potential market for, or value of, the copyrighted work. Traditionally the fourth factor carries the most weight,[39] but recent parody cases have emphasized the first factor.

1) *Purpose and character of the use*

A court would likely weight this first factor in favor of the defendant digital sampler of the Clinton saxophone photo. The Clinton collage would be seen as serving the purposes of news reporting and transformative political commentary. The plaintiffs, however, would also have strong arguments. We will first explore these.

The plaintiff in our hypothetical case would likely argue that appropriation of the copyrighted photo is for commercial use because the collage appears in a commercial publication. The defendant would counter that it is a news publication, and news reporting is one of the favored purposes for fair use. However, in light of *Harper Row v. Nation Enterprises*, the news reporting defense does not guarantee fair use. In *Harper* the Supreme Court ruled that when the Nation news magazine scooped Time magazine by running a large portion of President Ford's copyrighted memoirs, it did so for commercial reasons rather than news reasons. The court cited *Wainwright Securities Inc. v. Wall Street Transcript Corp.*: "Fair use 'distinguishes between "a true scholar and a chiseler who infringes a work for personal profit."'[40] The court also stated, "The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material."[41]

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[38] Goldstein, *Copyright: Principles, Law and Practice*, 260 (1995).

[39] 17 U.S.C. § 107.

[40] Harper & Row v. Nation Enterprises, 471 U.S. 539, 563 (1985).

In *Rogers v. Koons*, artist Jeff Koons used a copyrighted photo of a husband and wife holding a litter of puppies as a model in creating an unauthorized derivative work — a sculpture with close resemblance to the photo. The artist sold several copies of the sculpture. The circuit court noted that Koons' "substantial profit from his intentionally exploitative use of Rogers' work ...militates against the finding of fair use."[42]

The plaintiff in the Clinton collage case could also argue that the artist's manipulation of the Clinton saxophone photo was done in bad faith. According to Nimmer, "At least one additional factor relevant to the "character" of the use is the propriety of the defendant's conduct....Fair use presupposes 'good faith and fair dealing'."[43] In *Rogers v. Koons*, the sculptor Jeff Koons tore the copyright label from the copied photograph. The court saw this action as a bad-faith attempt to hide the unauthorized copying, and that the defendant stood to gain commercially from the bad-faith action.[44] In the case of the Clinton collage, a court might interpret the digital distortion of the Clinton sax photo as an attempt to hide the appropriation — thereby not showing fair dealing. The artist, for example, has altered shadow and tone on Clinton's sleeve (See enlargements of the sleeve areas in the attached figures 2 and 3). The digital manipulation of the sleeve is subtle and hard to detect. This kind of digital manipulation is different from the more obvious cropping and size distortion of other images in the work (e.g., the money) — it seems to serve to hide the manipulation rather than to further the aesthetic or creative value of the work.

Finally, the plaintiff could argue that the artist chose the medium of photo collage and digitally appropriated the photos to "avoid the drudgery in working up something fresh."[45] As the graphics editor points out in this paper's introduction, digital photo illustrating can be "an easy way out" for deadline conscious news artists.[46]

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[41] *Id.* at 562.

[42] Art Rogers v. Jeff Koons, 960 F.2d 301, 309 (2d Cir. 1992).

[43] M. NIMMER & D. NIMMER *see supra* note 27 § 13.05.

[44] *Rogers* 960 F.2d 301, 309 (2d Cir. 1992). See also *Harper* 471 U.S. at 562 (1985) (The Nation magazine's bad-faith scoop undermines its news-reporting defense.)

[45] Campbell, AKA Skyywalker v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 (1994).

We now take a look at the defendant's arguments.

In *Update Art v. Maariv* the district court is more accepting of the news reporting defense than the Supreme Court was in *Harper*. In this case, a newspaper appropriated a poster illustration portraying Ronald Reagan as the movie character "Rambo." The illustration accompanied a features article. A district court ruled that the purpose was "commentary or news reporting," and that therefore the first factor weighed in the defendant's favor. The court said, "The 'Ronbo' artwork can be seen as a pictorial representation of the central point of the article."[47] The court, however, weighted the other three factors against fair use.[48]

Under the *Update Art* ruling, the appropriation of the Clinton saxophone photo in the Clinton collage could fall under the favored purpose of "commentary or news reporting." The Clinton collage represents the central theme of the accompanying articles on the president's ethics problems, and the appropriated Clinton saxophone photo contributes to this commentary by portraying the president in a less-than-stately light.

Yet, the defendant of the Clinton collage could craft an even stronger defense than *Update Art* provides. The "Ronbo" graphic was an exact, wholesale copy of the original poster image, and in light of its non-transformative nature, the court found the other three factors weighed against fair use. The Clinton collage transforms the sampled photos, and in so doing, it provides new political commentary. U.S.C. 107 states that "political comment or criticism is [an] especially favored freedom of speech right ..."[49]

This transforming quality strongly aids the defendant's fair-use argument. Two recent cases involve the defense of parody, which is a type of transformative commentary particularly favored by the

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[46] *See supra* note 8.

[47] Update Art Inc. v. Maariv Israel Newspaper, Inc., 635 F. Supp. 228, 231 (S.D.N.Y. 1986).

[48] *Id.* at 232.

[49] 17 U.S.C.S. § 107.

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courts. In describing why parody is favored, justices also shed light on the broader defense of transformative commentary.

In the recent parody case of *Leibovitz v. Paramount Pictures*, Paramount, the owner of the derivative work, claimed fair use for reasons of parody. The plaintiff in the case was Annie Leibovitz, the photographer who took the famous shot of a pregnant, unclothed Demi Moore for the cover of "Vanity Fair." Paramount copied the image for a poster promoting their movie "Naked Gun 33 1/3: The Final Insult." They recreated the photo using a model stand-in and digitally modified the model's body so it would more closely resemble Moore's (but there was no digital sampling involved).They then superimposed actor Leslie Nielsen's head on it.[50]

Plaintiff and defendant agreed that the Leibovitz copyright was infringed in the movie ad, but the court backed Paramount's contention that the ad was a parody of the original photo and therefore fair use. No longer, said the court, would "every commercial use [be ruled] presumptively unfair."[51] The court described the central purpose of copyright: "to foster the creation and dissemination of the greatest number of creative works. The end result . . . is that the public now has before it, two works, vastly different in appeal and nature, where before there was only one."[52] Judges cited the Supreme Court decision in *Campbell v. Acuff-Rose* as the precedent for this decision.[53]

In *Campbell*, justices ruled that a rap song which borrowed heavily from Roy Orbison's ballad "Pretty Woman" was a fair use because its version was "transformative" in the appropriation of the Orbison song. The rap parody "adds something new,with a further purpose or different character, altering the first with new expression, meaning or message."[54] For a court to find parody, the commentary must be aimed specifically at the copied work itself. Again, in *Campbell*: "If . . . the commentary has no critical bearing on the substance or style of the original composition," the use will not be ruled to be fair.[55]

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[50] Leibovitz v. Paramount Pictures, 948 F. Supp. 1214, 1218. (S.D.N.Y. Dec., 1996)

[51] *Id.* at 1219.

[52] *Id.* at 1223.

[53] *Id.* at 1219.

[54] *Campbell*, 510 U.S. at 578.

The Clinton collage would not pass muster under a parody defense because its commentary is not aimed directly at the sampled Clinton saxophone photo fragment. However, the courts in *Campbell* and *Leibovitz* indicate a willingness to widen the scope of their support beyond just parody — they state that other types of commentary would pass muster under the fair-use test. The *Leibovitz* court cites *Campbell*: "The goal of copyright, to promote science and the arts is generally furthered by the creation of transformative works ... The more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."[56] The *Campbell* court also states: "*Like less ostensibly humorous forms of criticism*, it can provide social benefit by shedding light on an earlier work and, in the process, creating a new one . . . Thus parody, *like other comment or criticism*, may claim fair use.[57]

While a court may not see the appropriated photos as the direct objects of the transformative commentary, the defendant could make a strong case that the collage at least sheds new light on the sampled photo. The artists' altering of the news photo adds "new expression, meaning or message."[58] The artist has transformed the Clinton saxophone photo into a disturbing image, surrounded by visual fragments which represent ethical impropriety (money, photos of Paula Jones and Richard Nixon).The artist has created a new atmosphere of cynicism which alters the reader's view of the Clinton saxophone photo. The newspaper reader no longer sees the straight-forward image of Clinton as saxophone enthusiast (from the original photo). Rather the reader now rolls his eyes at "slick Willie," who might use the saxophone only as a media stunt.

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[55] *Id.*

An example of a failed parody argument can be found in *Rogers v. Koons*. The court rejected the sculptor's parody defense because appropriation of the Rogers photo was not a direct comment on the photo. "...it is not really the parody flag that appellants are sailing under, but rather the flag of piracy." *Koons*, 960 F. 2d at 311.

[56] *Leibovitz*, 948 F. Supp. at 1222.

[57] *Campbell*, 510 U.S. at 578 (emphasis added).

[58] *Id.*

Because of this transformative commentary — because of this new light shed — readers now have before them two works "when before there was only one."[59]

Finally, the defendant could successfully rebut the plaintiff's argument that the artist did not deal in good faith. Unlike the defendant in *Koons*, the defendant of the Clinton collage does not stand to gain commercially from manipulating the photo because of the illustration's transformative nature. (This issue will be discussed more thoroughly in the analysis of the fourth fair-use factor). Because there is no profit to be gained from hiding the copying of the Clinton sax photo, a court would likely dismiss this argument by the plaintiff.

A court then would likely rule then that the purpose of copying is transformative news commentary. The defendant would have strong court support under this first factor.

2) *The nature of the copyrighted work*

"This factor calls for recognition that some works are closer to the core of intended copyright protection than others."[60] Nimmer says, "the more creative a work, the more protection it should be accorded from copying.[61] He also says, "...many copyrights represent significant creative effort and are therefore reasonably robust, whereas others reflect only scant creativity; the Supreme Court labels the latter 'thin'." He concludes that for the plaintiff who is claiming infringement of a "thin" work, there is a higher burden of proof to show illicit copying — the copy must show "virtual identity."[62] Despite the fact that news photos may sometimes be seen as being thin in creativity because of their realness[63], the Clinton saxophone photo has sufficient creativity for a court to likely weight this factor in favor of the plaintiff photographers. As mentioned earlier, *Bleistein* and *Jewelers Circular* established the precedent for the simplest, most poorly composed photos being copyrightable. Also mentioned earlier, courts shy away from making aesthetic judgments about creative works.

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[59] *Leibovitz*, 948 F. Supp. at 1223.

[60] *Campbell*, 510 U.S. at 564.

[61] M. NIMMER & D. NIMMER *supra* note 27 § 13.05.

[62] M. NIMMER & D. NIMMER *supra* note 27 § 13.03

[63] *See* Tomlinson and Harris (discussion of the courts valuing the information of news photos over their creative value). *See* Time v. Geis, 293 F. Supp. 130 (S.D.N.Y. 1968) (photos ruled uncopyrightable because of value of information to public).

There has been at least one case since *Bleistein* in which a court declared photos to be sufficiently creative and still uncopyrightable. In *Time Inc. v. Bernard Geis*, the court stated that it agreed with the principle that photos were copyrightable no matter how lacking in originality or creativity, as set forth in *Bleistein.*[64] Because however, the photos at issue were the famous Abraham Zapruder photos of President Kennedy's assassination, the acute public interest in the photos outweighed the copyright — the photos served as visual aids in analyzing the assassination. In this case, realness, which is often seen as photography's strength, was the photographer's undoing. The court stated: "While doubtless the theory [of the assassination] could be explained with sketches ... , The explanation actually made in the book with copies [photos] is easier to understand."[65] While this was an unusual case involving a matter of a high public interest, it does illustrate that circumstances exist in which courts will favor a news photo's informative value over its creative value. The court here indicates that sketches would have been considered copyrightable.

A court, however, is unlikely to follow *Geis* in deciding this factor in our hypothetical case. The Clinton saxophone photo does not display information of high public interest. Following the *Bleistein* precedent, the Clinton saxophone photo shows enough creativity to have this second factor weigh in the plaintiff photographer's favor. However, a court may still see news photos as somewhat creatively thin because of their realness, and therefore this factor may not carry much weight in the final analysis.

3) *The amount and substantiality of the portion used in relation to the copyrighted work as a whole*

This factor relates to the criterion of substantial similarity discussed in the preceding section on copyright infringement. Nimmer points out that this factor, as in the test for substantial similarity,

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[64] Time Incorporated v. Bernard Geis Associates, 293 F. Supp. 130, 141 (S.D.N.Y. 1968).

[65] *Id.* at 146.

"includes a determination of not just quantitative, but also qualitative substantiality."[66] Amount and substantiality of copying were discussed thoroughly in the section on substantial similarity. The author concluded that the sampling from the Clinton saxophone photo in the collage was substantially similar to the original news photos and therefore infringing. The artist sampled a highly substantial amount of the Clinton saxophone photo — almost the entire composition. This conclusion is directly relevant to a finding under this third factor, and a court would find that this factor favors the defendant photographers.

Because of the transformative nature of the collage, however, it is doubtful, that this factor would carry as much weight as the first and fourth factors. In *Leibovitz*, the court says, "The Supreme Court has recognized that the extent of permissible copying varies with the purpose and character of the use."[67] The *Campbell* court said: "When parody takes aim at particular original work, the parody must be able to "conjure up" at least enough of the original to make the object of its critical wit recognizable."[68] The Clinton collage is not a parody, but it is a transformative commentary which sheds new light on the sampled photo fragments. The key for the *Campbell* court in judging this factor was to what degree the derivative work was transformative: "The more transformative the new work, the less will be the significance of other factors . . ."[69]

The *Ringgold* court did not give the third factor much weight: " . . . courts considering the fair use defense in the context of visual works . . . displayed in other visual works must be careful not to permit this factor to tip the aggregate fair use assessment in favor of those whom the other three factors do not favor." Otherwise, the court says, a defendant who impairs the market for the borrowed work will escape liability by claiming only a small infringement.[70] Conversely, it could be argued that the defendant who does not impair the market for the borrowed work may be unfairly held liable for a qualitatively or quantitatively large borrowing (as with our hypothetical case). As will be shown under analysis of the fourth factor, the transformative nature of the collage prevents it from impairing the market for the sampled photos. The defendant sampler has not pirated these photos for commercial gain — he has sampled the photos to aid in making transformative political commentary for the purpose of news reporting. Therefore, following *Ringgold* and *Campbell*, this third factor should not be given much weight.

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[66] M. NIMMER AND D. NIMMER *supra* note 27 § 13.05.

[67] *Leibovitz*, 948 F. Supp. at 1223.

[68] *Campbell*, 510 U.S. at 567.

[69] *Campbell*, 510 U.S. at 577.

[70] *Ringgold*, 25 Med. L. Rptr. 2387, 2397 (2d Cir. 1997).

4) *The effect on the potential market for or value of the copyrighted work*

Nimmer cites the Second Circuit in its characterization of the fourth part of the fair-use test. The courts must strike a balance "between the benefit the public will derive if the use is permitted and the personal gain the copyright owner will receive if the use is denied." The issue here is financial damage done from usurpation of the demand for plaintiff's work because of copying.[71] The *Harper* court calls this fourth factor "undoubtedly the single most important element of fair use."[72] This is not because of the weight given this factor but because of its close connection with the other three factors.[73]

As mentioned above, this factor favors the defendant of the Clinton collage. The appropriated photo and its copy in the derivative collage are of such different natures, that it is hard to conceive of them competing in the same market. As the *Campbell* court says, "when...the second use is transformative...market harm may not be so readily inferred."[74] In her article on collage and fair use, Sonya del Peral argues that collagists should have the fourth factor weigh in their favor. The collage would not impair the market for the photo because collage is a 'different expressive identity' than the incorporated work.[75]

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[71] M. NIMMER & D. NIMMER, *supra* note 27 § 13.05.

[72] *Harper*, 471 U.S. at 566.

[73] *Leibovitz*, 948 F. Supp. at 1225.

[74] *Id.*, at 570.

[75] Peral, *see supra* note 18 at 164.

The *Leibovitz* court expresses a similar argument. A parody by nature changes the original and is therefore unlikely to hurt the market for the original. The *Leibovitz* court notes that the plaintiff has suffered no decrease in sales of the Moore photo. "This is not surprising in light of the unlikelihood that a consumer who was in the market for an image such as the Moore photograph — a serious comment on a woman's fulfillment in her pregnancy — would have his or her demand satisfied by a slapstick parody such as the Nielsen advertisement."[76]

We can use this "average consumer" test, as informally expressed in *Leibovitz* ,to indicate whether this fourth factor would favor fair use of the Clinton saxophone photo. The Clinton collage's transformative nature ensures different markets for the photo and the illustration. It is unlikely that someone, or some news organization, in the market for a straight-forward photo of the president holding a saxophone would have this need met by an illustration which physically warps the president and questions the ethicalness of his behavior.

It is even conceivable that unapproved use of a copyrighted photo could help the potential market of the photo. The *Ringgold* court said: . . . unauthorized displays of a visual work might often increase viewers' desire to see the work again."[77] This view is not unanimous, however. The *Update Art* court found "unpersuasive" the defense's suggestion that copying would increase demand for the original "Ronbo" poster. The court weighed the fourth factor in the plaintiff's favor because both the original and newspaper copy appeared in poster form and therefore competed in similar markets.[78]

Final analysis

In light of the four-part test, the sampling of the Clinton saxophone photo in the Clinton collage should be ruled a fair use. The key is its transformative nature.

A court would weigh factors one and four in favor of the defendant digital sampler, and these factors would carry more weight than factors two and three. The transformative nature of the collage ensures that factor one — purpose and character of the use — would weigh heavily, and factor four — the effect on the market of the original — traditionally weighs heavily. The collage would also have strong First Amendment protection because it makes political commentary, and the Amendment favors political speech.

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[76] *Leibovitz*, 948 F. Supp. at 1226.

[77] *Ringgold* 25 Med. L. Rptr. 2387, 2390 (2d. Cir. 1997).

[78] *Update Art*, 635 F. Supp. at 232.

The analyses of substantial similarity and fair use for visual works are fact specific. Different collages would be transformative to different degrees, and different collages would necessitate different sampling — quantitatively and qualitatively. These analyses must be made on a case-by-case basis. However, the Clinton collage is typical of collages frequently appearing in news publications today in that it combines a dominant image with other images which represent aspects of the theme of the news article being illustrated. Many of the points discussed in these analyses would be relevant to other news collages.

LESSONS FOR NEWS PUBLICATIONS

In defending art collagists, Peral argues, "for their art form to flourish, collagists must be able to incorporate copyrighted works" without concern for retribution.[79] News organizations should be equally passionate about the right to use news photos in making effective visual political and social commentary.

Most editors would rather have the realness and immediacy of a straight news photo to illustrate a real-world issue. Sometimes however, stories treat these issues in conceptual ways. Editors in these situations need the realness of a photo together with the conceptual nature of an illustration — thus, the photo illustration.[80] The realness and immediacy of the photos in such illustrations more effectively communicate the importance of a news story than would a sketch or painting. Such illustrations enhance the "news reporting" of important issues because they draw attention to these stories. They can also stand alone as effective political or social commentary.

Artists at a news publication may use staff photos or works-for-hire in such derivative works.

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[79] Peral, *see supra* note 18 at 141.

[80] From the author's experience as a newspaper photo illustrator.

Sometimes, however, the necessary photos may not be available through these resources. Fair use of copyrighted photos would mean a wider selection of art for newspaper artists at "crunch-time." Easing deadline pressures would encourage quality, resulting in more effective and creative social and political commentary.

Absent a successful fair-use argument, it appears that most photo sampling that would be useful to news artists would be infringing. The only sampling from the hypothetical cases which does not infringe is the trivial sampling of the tiny ear fragment. Even the quantitatively small sampling of the Clinton mouth fragment is likely to infringe because of the qualitative importance of the mouth's expression. News artists creating collages are likely to look for expressive photo fragments to help make the point of their commentary, and they will therefore often run afoul of the substantial similarity test.

They would, however, have a good chance of being granted fair use of these photos. In order to ensure fair use, artists and art directors should keep in mind the following.

1) **Transform the sampling.** The key is for the collage artist to make significant transformative commentary on the appropriated photos. While *Update Art* provides a news reporting defense under the first factor, this case would not be much help for non-transformative illustrations. The *Campbell* and *Leibovitz* courts make it clear that the more transformative the use, the better chance fair use will be found.

2) **Be diligent.** Collages which are highly transformative are also typically more difficult to create. The increased effort involved in making transformative commentary would help defend against a plaintiff's charge that the copying was only done to "avoid drudgery."[81]

3) **Be above board.** Artists should be wary of subtle and hard-to-detect photo manipulation. Courts could view this type of altering as attempting to hide borrowing and therefore dealing unfairly. Artists should only digitally manipulate in order to create more effective and transformative commentary. Such good-faith manipulation would naturally be obvious and above-board — the artist would *want* the reader to see the creative effect such manipulation has on the overall work.

4) **Beware of commentary that is not political or social.** Copyright law indicates that political

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[81] *Campbell*, 510 U.S. at 578.

commentary is highly favored because political speech is highly protected under the First Amendment.[82] Courts might be less likely to grant fair use of a photo for a food-section collage than for an op-ed page collage.

As long as news artists abide by these guidelines, publishers, editors and art directors should not have to worry about unauthorized copying of news photos for collages. Such works further the goals of copyrighting in promoting the arts, and they contribute to the robustness of the nation's political and social discourse.

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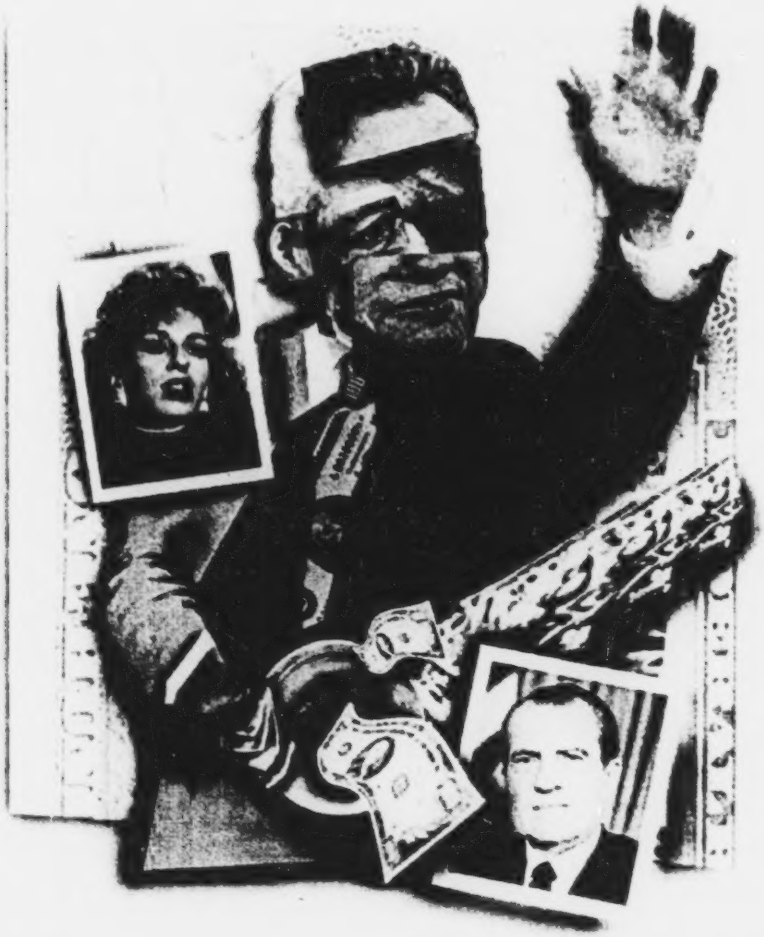
[82] 17 U.S.C. § 107.

CLINTON COLLAGE (figure 1)



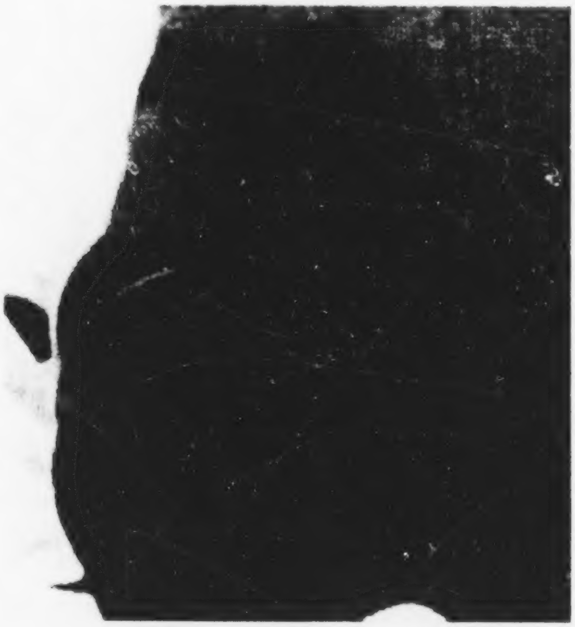
CLINTON EAR PHOTO
unauthorized borrowing
smallest sampling

CLINTON MOUTH PHOTO
unauthorized borrowing
next smallest sampling

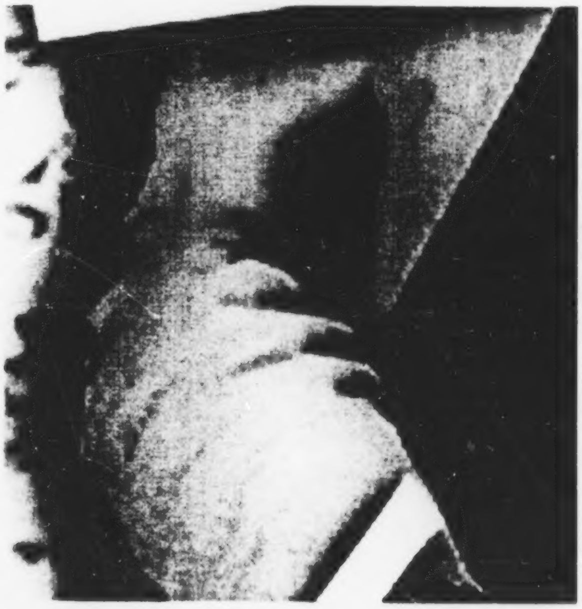
CLINTON SAX PHOTO
unauthorized borrowing
large sampling

BEST COPY AVAILABLE

CLINTON SLEEVE DETAIL, ORIGINAL
(figure 2)



CLINTON SLEEVE DETAIL, ALTERED
(figure 3)



BEST COPY AVAILABLE

SETTING NEW BOUNDARIES:
HOW IOWA NEWSPAPER EDITORS ARE APPLYING A NEW LAW GRANTING THEM EXPANDED ACCESS TO JUVENILE NAMES

by

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SETTING NEW BOUNDARIES: HOW IOWA NEWSPAPER EDITORS ARE APPLYING A NEW LAW GRANTING THEM EXPANDED ACCESS TO JUVENILE NAMES

I. Introduction

During its 1997 session, the Iowa Legislature approved a bill that attempted to tackle juvenile crime on several fronts. One of its provisions allows authorities to release the names of youngsters ten and older once they are taken into custody "for a delinquent act which would be a public offense" [1] or if a filed complaint alleges they have "committed a delinquent act, which if committed by an adult would be a public offense." That law went into effect July 1, 1997.[2]

In passing that bill, the Iowa Legislature joined a growing number of states moving to grant greater openness to juvenile records.[3] Since July 1, Iowa newspaper editors have had the opportunity to print the names of juveniles who have been taken into custody or charged. But have they taken that opportunity? Not only does this paper look at what Iowa newspaper editors have done with that increased access to information about juveniles (and whether they are even gaining access to the juvenile records), it also looks at what entered into their decision to print or not to print the names and explores the concerns some editors have regarding the printing of names of juveniles.

As this paper examines how editors have translated this law into practice, it first gives a brief history of the juvenile court system in this country and how confidentiality came to be such an important part of how that system operated.

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[1] 1997 Iowa S.F. 515.

[2] Ibid.

[3] Thomas A. Hughes, "Opening the Doors to Juvenile Court: Is there an Emerging Right of Public Access?" *Communications and the Law*, 19, no. 1 (March 1997): 1-50; *Privacy and Juvenile Justice Records: A Mid-Decade Status Report, A Criminal Justice Information Policy Report*, U.S. Department of

A necessary part of this examination will be to look at the constitutionality of juvenile confidentiality. The Supreme Court has, on several occasions, weighed a youngster's right to confidentiality against the right of the press to publish names of juveniles, and each time has come down on the side of the press.

At that point this paper will begin to look at the recent move away from confidentiality in the juvenile justice process and the reasons raised by the various parties interested in juvenile justice. One reason some claim confidentiality is no longer necessary is that juvenile crime has increased so much in recent years. Statistics gathered by federal agencies show that juvenile crime rose rapidly during the early 1990s, but the most recent statistics show it may have slowed down for the past year.[4]

Next this paper will look at why Iowa Gov. Terry Branstad called for this legislation and why he said, "We are doing a disservice to the people of Iowa by shielding juvenile offenders from public disclosure."[5]

With that background in place, this paper will turn its focus onto the editors of Iowa newspapers and will find that, in spite of this green light from the Iowa Legislature, they are not rushing in droves to publish the names of ten-year-olds taken into custody. A total of thirty-four Iowa newspapers were included in the sampling, seven of them nondaily newspapers. Editors at twenty-four newspapers were interviewed, mostly through telephone interviews, by the author. The other ten newspapers included in this paper had responded to a poll conducted by the Iowa Associated Press Managing Editors. All interviews were conducted between October and December 1997.

The editors were asked what they were doing with this expanded access to information about juveniles, what had gone into their decisions to use or not to use this information and whether they were gaining access to this information.

Justice, Office of Justice Programs, Bureau of Justice Statistics (March 1997) www.ojp.usdoj.gov/bjs/ascii/pjjr.txt.

[4] *Uniform Crime Reports*, 1996, 1997, Federal Bureau of Investigation, Washington, D.C.

[5] Gov. Terry Branstad, speech, "Governor's Program to Combat Youth Violence and Juvenile Crime," (Dec. 16, 1996): www.state.ia.us/government/governor/juvee.htm.

II. Juvenile law and confidentiality

A. *History of juvenile courts*

It was not until the late 1800s that the idea of separate courts for juveniles really began to take hold. The first juvenile court statute was adopted by Illinois in 1899 and has spread to all 50 states, Washington, D.C., and Puerto Rico.[6] It wasn't until 1904 that Iowa adopted a juvenile court system.[7]

The separate juvenile court movement came about partly because the "reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals."[8] They were also concerned that children would never have a chance to be rehabilitated.[9] Common law had considered children under the age of seven "incapable of possessing criminal intent. Beyond that age, they were subjected to arrest, trial, and in theory to punishment like adult offenders."[10] Justice Harlan in one case refers to a twelve-year-old boy who had been found guilty of murder and was hanged.[11]

The early reformers looked not to the ages of seven to ten as the age at which youngsters could reason, but pushed the age for recognition of their criminal liability up to sixteen or seventeen.[12]

Those members of the "Progressive Movement" in juvenile reform believed that a youngster's criminal behavior was caused by external forces and was not a result of his own free will.[13] Under a separate court system, the juvenile was not to be treated as if "he was under arrest or on trial."[14] Rather, the goal was to reform the offender rather than punish for the offense. The reformers felt such a youngster could, indeed, be treated for the ailment of juvenile delinquency and could be rehabilitated.[15]

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[6] In re Gault et al, 387 U.S. 1, 14. (1967).

[7] In the Interest of M.M.G., a minor child, State of Iowa Appellants, 564 N.W.2d 9, 10; 1997 Iowa Sup.

[8] Gault, 15.

[9] Arthur R. Blum, "Disclosing the Identities of Juvenile Felons: Introducing Accountability to Juvenile Justice," *Loyola University Chicago Law Journal* 27 (Winter 1996): 349, 352.

[10] Gault, 16.

[11] Gault, 80.

[12] Blum, 358.

[13] *Privacy and Juvenile Justice Records,* U.S. Department of Justice.

The juvenile justice reform movement a century ago was premised on three beliefs: that they could identify and treat whatever caused juvenile crime, that children could be rehabilitated and that the state's parents patriae power was sincerely interested in the child.[16] The juvenile had become a delinquent, the reformers said, because he experienced defects in his environment, in his physical makeup or in his psychological condition.[17]

As a result, the new court system that was formed "focused on meeting the special needs of troubled children."[18]

The early reformers had envisioned the juvenile court as a place "in which a fatherly judge touched the heart and conscience of the erring youth by talking over his problems, by paternal advice and admonition, and in which, in extreme situations, benevolent and wise institutions of the State provided guidance and help 'to save him from a downward career.'"[19]

The juveniles should be treated "as a wise and merciful father handles his own child whose errors are not discovered by the authorities."[20] Actually, under the separate juvenile system, "judges were given almost limitless discretion in crafting the disposition to facilitate whatever the judge thought would 'cure' the youth."[21]

Early judges, it was suggested, should not sit on their benches and look down upon the youngsters, but rather should be "[s]eated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him, the judge, while losing none of his judicial dignity, will gain immensely in the effectiveness of his work."[22] Juvenile courts, therefore, were expected to be informal and and as helpful as possible to the offender.

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[14] Gault, 15.
[15] Blum, 360.
[16] Blum, 363.
[17] Blum, 359.
[18] Blum, 351.
[19] Gault, 26.
[20] Julian W. Mack, "The Juvenile Court," *Harvard Law Review* 23 (1909): 104, 107.
[21] Janet E. Ainsworth, "Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court," *North Carolina Law Review* 69 (1991): 1083, 1099.

The secret hearings, the reformers felt, were necessary "to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past."[23]

In one of the first major cases dealing with juvenile confidentiality to come before the Supreme Court, the justices said that the "claim of secrecy, however, is more rhetoric than reality." They pointed out that in most jurisdictions, judges have some discretion on whether to release a juvenile's records. In fact, the Court said, many courts willingly supply information about the young offender to government agencies such as the FBI and the military and even to potential employers.[24]

As for police records, the Court said that police in most states "keep a complete file of juvenile 'police contacts' and have complete discretion as to disclosure of juvenile records."[25]

B. *The arguments for confidentiality*

Since the early days of the juvenile courts, anonymity had been one of the hallmarks of the juvenile justice process. It was important, one of the early juvenile judges said, not to think of the child as a criminal and "to save it from the brand of criminality, the brand that sticks to it for life."[26] Publishing an offender's name has been criticized because "it is seen as an attempt to inflict a form of punishment on the juvenile."[27] In fact, under the juvenile justice system set up by the early reformers, a youngster who had committed a crime was not really guilty, because he did not have the criminal capacity to be responsible for his crimes.

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[22] Mack, 120.
[23] Gault, 24.
[24] Gault, 24.
[25] Gault, 24-25.
[26] Mack, 109.
[27] Paul R. Kfoury, "Confidentiality and the Juvenile Offender," *New England Journal on Criminal and Civil Confinement* 17 (1991): 55, 56.

Others have said that media should not identify juveniles because that only perpetuates the public's already "flawed perception" of today's youth.[28] In addition, the youngster's chance at rehabilitation will be hurt "because it will increase his self-perception of his own delinquency, disrupt his family's ability to support and counsel the youth, and negatively affect his interaction with peers, teachers, and the surrounding community."[29]

Much has been written about how "labeling" affects youngsters and why confidentiality has been an important part of the rehabilitation process. The early reformers, who firmly believed that youngsters could be rehabilitated, expected confidentiality to ward off the stigmas society would place upon the youngster.[30]

In fact, societal reactions to juveniles who have been labeled may be negative and may in turn cause a person to be isolated and that, in turn, could lead to even more deviant behavior.[31]

Labeling theory as a whole centers on the premise that another person's perceptions of you can control your behavior. Under that theory, someone adjudicated a delinquent who has not been made public would be less likely to resort to negative behavior than a juvenile whose status as a delinquent has been publicized.[32]

Another reason supporters claim confidentiality is needed is that the juvenile offender might, in fact, be pleased with the media attention he has received and is more likely to become a repeat offender.[33] And by the same token, that attention might have an impact on other juveniles who also commit crimes in the hopes they, too, will receive either that kind of publicity or the approval of their peers.[34]

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[28] Kathleen M. Laubenstein, "Media Access to Juvenile Justice: Should Freedom of the Press be Limited to Promote Rehabilitation of Youthful Offenders?" *Temple Law Review* 68 (1995): 1897.
[29] Ibid., 1898.
[30] Blum, 368.
[31] Anne Rankin Mahoney, "The Effect of Labeling Upon Youths in the Juvenile Justice System: A Review of the Evidence," *Law and Society Review* 8. (1974): 583, 584.
[32] Laubenstein, 1903.
[33] Ibid.

Furthermore, a juvenile who has been labeled as a delinquent may have problems at school, with both his peers and his teachers. "Research indicates that the greater a juvenile's sense of attachment to his school[35] and education in general, the less likely he is to engage in delinquent behavior."[36] The problems may arise in a juvenile's ability to interact with students who are succeeding in school and with students who are not delinquent. That, in turn, may lead him to associate increasingly with others who have also been labeled as delinquents. The publicity about a juvenile delinquent is also likely to have a negative impact on the youngster's ability to find a job.[37]

Anne Bunz, legislative liaison for the Youth Law Center in Des Moines, expressed a concern that the Legislature has eliminated most of the distinctions between juveniles and adults in court. Before S.F. 515 was approved, she had proposed an amendment that would have struck the whole public record section of the juvenile bill. Besides, she said, "a youngster convicted of a forcible felony is going to be a matter of public record anyway."[38]

And while she agreed that youngsters should be held accountable in some way, she did not think publicity was the answer. "Juveniles are different than adults and should be treated differently. Youngsters make mistakes and should be allowed to learn from those mistakes."[39]

She was especially concerned about the youngsters who do something fairly small, like shoplifting or a minor first offense. "That information will automatically have him marked as bad."[40]

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[34] Ibid., 1904.
[35] Ibid.
[36] Ibid., 1905
[37] Ibid.
[38] Anne Bunz, legislative liaison for the Youth Law Center in Des Moines, Iowa, telephone interview by author on October 22, 1997.
[39] Ibid.
[40] Ibid.

In small towns, most people know offenders anyway, she said, and that in itself is already damaging. The students who are also athletes will miss some games and teachers may label that youngster as a troublemaker. Then a stigma is attached although a lot of these youngsters have not meant any harm. That's what childhood is for, making mistakes and learning from them.[41]

The research examining labeling has produced inconsistent results, and has not conclusively identified the effects of labeling on delinquency. Nor have studies actually measured how someone who has officially been adjudicated as a delinquent might be affected by the resulting publicity.[42]

C. *The argument against confidentiality*

Although the juvenile court system as it was put into practice nearly a century ago used confidentiality as one of its main tenets, by 1920 only seven states prohibited disclosure of various juvenile court records.[43]

The need for confidentiality was linked to its need in the rehabilitation process, but because the juvenile justice system has not been especially successful in that rehabilitation, some believe there is no longer any reason to protect delinquents from the stigma of that label.[44]

Those who advocate more access to the identities of juveniles say that confidentiality does not really exist anyway. In fact, some of those same advocates would argue, that the fear of embarrassing oneself or one's family would actually serve as a deterrent.[45]

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[41] Ibid.
[42] Laubenstein, 1902, 1907.
[43] Blum, 368.
[44] Ibid., 368, 369.
[45] Kfoury, 56.

Although this paper will not examine this particular criticism, some call for the juvenile process to be opened because of the abuses in some juvenile courts and by some juvenile justice professionals.

A juvenile court judge has been among those calling for an abandonment of confidentiality in the juvenile process and granting those in the juvenile justice system greater access to a juvenile's records.[46]

Some would argue that it is difficult to measure self-esteem and therefore it is difficult to determine if a juvenile is harmed by having his name released.[47] Or perhaps confidentiality is not needed because researchers do not know exactly what it is that causes delinquency.[48]

Others argue that disclosure of identities is important for the "moral health" of communities. One way to maintain a community's "moral health" is to let it "express its disapproval of those who threaten it."[49]

With openness in the juvenile justice process, a community can also see that the process is working, and can perhaps force the process to become more effective.[50] Others would argue the public has a safety interest in guarding against juvenile delinquents.[51]

Disclosure of the name is, in fact, good for the child, because children need to know how their communities feel about them.[52]

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[46] Gordon A. Martin Jr., "The Delinquent and the Juvenile Court: Is There Still a Place for Rehabilitation?" *Connecticut Law Review* 25 (Fall 1992): 57.

[47] Lee E. Ross, "The Relationship Between Religion, Self-Esteem and Delinquency," *Journal of Crime and Justice* 19 (1996): 195, 201.

[48] George Bundy Smith and Gloria M. Dabiri, "The Judicial Role in the Treatment of Juvenile Delinquents," *Journal of Law and Policy* 3 (1992): 347, 368.

[49] Blum, 399.

[50] Kfoury, 57.

[51] "The Public Right of Access to Juvenile Delinquency Hearings," *Michigan Law Review* 81 (1983): 1540, 1558.

[52] Blum, 399.

D. *Constitutionality of juvenile confidentiality*

"The United States Supreme Court has not attempted to define a constitutional right of confidentiality for an adjudicated delinquent. There is no such constitutional right."[53]

Justice Warren Burger, in *Davis v. Alaska* [54] said that although the state certainly had an interest in "protecting the confidentiality of a juvenile offender's record," it was more important to the judicial process to allow the cross-examination of that juvenile.[55]

The Supreme Court took up the news media's use of a juvenile's name in cases decided in 1977 and 1979. It revisited the idea of juvenile confidentiality in a 1982 case.

In *Oklahoma Publishing Co. v. District Court*,[56] the Court said the First and Fourteenth amendments did not allow the state to ban publication of information the news media obtained during an open court session. An eleven-year-old boy involved in a homicide had been photographed and widely named by the media. In the per curiam decision, the Court did not discuss the confidentiality of the juvenile proceeding.

Two years later the Supreme Court took up the issue of a juvenile whose name had been published after newspapers had learned the name from the police radio and eyewitnesses in *Smith v. Daily Mail Publishing Co.*[57] A West Virginia statute made it a crime for a newspaper to publish a juvenile's name without written permission from the juvenile court, although the statute's restriction did not extend to the broadcast media or any other kind of publication. The West Virginia Supreme Court of Appeals had said that "statute operated as a prior restraint on speech and that the State's interest in protecting the identity of the juvenile offender did not overcome the heavy presumption against the constitutionality of such prior restraints."[58]

The U.S. Supreme Court, in its decision, said West Virginia was trying to protect the juvenile because "confidentiality will further his rehabilitation because publication of the name may encourage further antisocial conduct and also may cause the juvenile to lose future employment or suffer other consequences for this single offense." However, Chief Justice Burger said, "The magnitude of the State's interest in this statute is not sufficient to justify application of a criminal penalty to" the newspapers.[59]

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[53] Kfoury, 57.
[54] 415 U.S. 308 (1974).
[55] Ibid., 320.
[56] 430 U.S. 308 (1977).
[57] 443 U.S. 97 (1979).

Three years later the Supreme Court again looked at the conflict between a juvenile's confidentiality and openness in *Globe Newspaper Co. v. Superior Court for the County of Norfolk*, only in this case the juvenile was a victim.[60] Justice Brennan, writing for the majority, said that "safeguarding the physical and psychological well-being of a minor is a compelling one. But as compelling as that interest is, it[61] does not justify a mandatory closure rule."[62]

As the cases show, the Court has not given juveniles any kind of a constitutional right to confidentiality, so that allows individual states to stop providing confidentiality if they choose. "The issue of preserving juvenile confidentiality, therefore, is a political, not a constitutional question. The political landscape, however, is no longer favorable for juvenile courts."[63]

E. *Juvenile crime statistics*

Legislatures across the United States cite the statistics showing a dramatic increase in juvenile crime over the past decade as one of the reasons for increasing access to juvenile records.

A study by the Office of Justice Programs showed that between 1985 and 1994, the number of delinquency cases that were waived into criminal court increased 71 percent,

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[58] Ibid., 100.
[59] Ibid., 104.
[60] 457 U.S. 596 (1982).
[61] Ibid., 607.
[62] Ibid., 608.
[63] Blum, 376.

from 7,200 to 12,300 cases annually.[64] Juveniles were moving into criminal courts because they were committing more serious crimes. In 1991, offenses against property outnumbered those against people, but by 1994 most of those waived into criminal court were facing offenses against people. The study showed that fourteen out of every 1,000 cases were waived into criminal court.[65]

Yet another study found the arrest rate of those under eighteen increased 167.9 percent for murder and non-negligent manslaughter between 1984 and 1993.[66]

In addition, the number of arrests of those under age fifteen has been rising, with arrests for violent crimes by those under fifteen up 94 percent between 1980 and 1995 while arrests for older youths were up only 47 percent during that same time period.[67]

Juvenile crime has also increased in Iowa during this decade. FBI statistics comparing crimes in 1992 to reported crimes in 1996 show that the number of aggravated assaults went from 284 to 385, burglaries increased from 378 to 612, larceny theft increased from 2,096 to 3,092, motor vehicle thefts increased from 153 to 305, arsons increased from 50 to 103, robberies from 36 to 58, violent crimes from 338 to 458 and property crimes rose from 2,677 to 4,112. The only crime that dropped during that period was forcible rape, which went from 18 reported cases in 1992 to 11 in 1996.[68]

The media coverage of these crimes may be influencing legislatures around the country to pass legislation requiring delinquents to be more accountable.[69]

However, the FBI figures for juvenile crime released in early October 1997 show some slowing of the national increase. For the two-year period 1995-1996, juvenile arrests rose 3 percent while adult arrests showed virtually no change. But violent crime arrests of

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[64] Jeffrey A. Butts, Ph.D, "Delinquency Cases Waived to Criminal Court, 1985-1994," Office of Juvenile Justice and Delinquency Prevention (February 1997): www.ncjrs.org/txtfiles/164265.txt.

[65] Ibid.

[66] "Juvenile Arrests 1995," U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention (February 1997): www.ncjrs.org/txtfiles/16381.txt.

[67] Butts.

[68] "Crime Index Arrest Trends 1992-1996," Federal Bureau of Investigation, www.fbi.gov/ucr/arr92964.pdf.

[69] Barry C. Feld, "Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform," *Minnesota Law Review* 79 (May 1995): 965.

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juveniles decreased 6 percent and those of adults, 3 percent.[70] A study of the FBI's statistics also found a 6 percent decrease between 1994 and 1995 in the number of thirteen- and fourteen-year-olds arrested for violent crimes and a 2 percent drop for those older than fifteen.[71]

II. Opening access to juvenile records

A. *Access opens around the country*

Greater access to juvenile records is being granted not only by legislative changes in many states, but also by administrative or court decisions. In granting this access, states are moving further from the juvenile justice system that was put into place nearly a century ago and moving closer to treating juveniles as adults — just what the system had been designed to avoid.[72]

First of all, a number of people already have access to juvenile records. Along with the institutions that deal with juvenile custody and the juvenile court staff, prosecutors, law enforcement and probation officers may also have access. Other states allow the juvenile's attorney, the juvenile's parents, the juvenile's victims, those who might be in danger from a juvenile, school officials and even housing agencies to have access.[73]

Legislatures around the country have jumped onto the bandwagon and lowered the age at which juvenile records can become a public record. However, those states are not going as far as Iowa in dropping to ten the age at which a wide array of juvenile information can become a public record. Among the states introducing or passing legislation during 1997 were Hawaii, which will release the names of hardened juveniles at age twelve; Idaho, which will release names of those fourteen and older who have been charged, and in some instances those as young as thirteen; and New Mexico, where the age dropped from fifteen to fourteen.[74]

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[70] "Portions of Crime in the United States 1996," (Oct. 4, 1997): www.fbi.gov/pressrel/ucr/ucr.htm.
[71] Butts.
[72] Privacy and Juvenile Justice Records."
[73] Ibid.

However, the authors of a study of adolescents who had been automatically transferred to adult court after they were accused of murder said, "Our research highlights the need for research also to examine aspects of community sentiment that legislators use to justify statutory changes."[75] The study found that there was not sentiment for trying all juveniles as adults if they had been accused of murder. The juvenile's background — especially if the child had been abused — should be taken into account.[76]

B. *Iowa increases access*

After having granted access to juvenile records in the 1960s and 1970s, the Iowa Legislature in 1979 made most records again confidential.[77] Rep. Jeffrey Lamberti, who chaired the House Judiciary Committee and helped get the 1997 legislation passed, said he believed the move toward confidentiality was the wrong way to go. "While concerned about the juvenile's self-esteem, what the social scientists were really doing was shielding juveniles from accountability."[78]

While Lamberti, R-Ankeny, agrees that other issues, such as "the explosion of single parent families and terrible, negligent parents"[79] add to the juveniles' delinquent behavior, he said that confidentiality has played a large role. "Prior to the changes in our juvenile law, when they were held accountable and the records were public, juvenile crime was hardly a problem. The most serious offenses were things, such as shoplifting, which are considered minor offenses today. After the laws were changed to shield juveniles, juvenile crime exploded throughout the country, including Iowa."[80] Lamberti, an attorney who has some experience in juvenile law, said, "From speaking with judges, juvenile court officers, counselors and law enforcement personnel, I can tell you the majority of them agree that the lack of accountability is the major problem in our juvenile code. While making their names public may not solve the problem, it is certainly a step in the right direction."[81]

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[74] 1997 HI H.B. 1427, 1997 ID S.B. 1018 and 1997 NM H.B. 767.

[75] Loretta J. Stalans and Gary T. Henry, "Societal Views of Justice for Adolescents Accused of Murder: Inconsistency Between Community Sentiment and Automatic Legislative Transfers," *Law and Human Behavior*, 18, no. 6 (December 1994): 675, 692.

[76] Ibid, 675-696.

[77] 1979 Iowa AG Lexis 35, 1; 1979-80 Op. Atty. Gen., Iowa 413. However, in response to a question about the initial complaint on a juvenile being part of the public record, the Attorney General's Office issued an opinion that said "juvenile court records in cases alleging delinquency are public records, and since complaints are part of the official juvenile court records, initial complaints on juveniles are public records."

[78] E-mail correspondence with Rep. Jeffrey Lamberti, January 26, 1998.

[79] Ibid.

In recent years Iowa has joined the crowd of states gradually increasing access to its juvenile justice system. The 1995 Legislature moved sixteen-year-olds away from juvenile court and into adult court if they had committed any drug-related, firearms or weapons offenses as well as certain gang activities or forcible felonies. They also lowered the age to fourteen for youths who could be transferred into adult court, which meant their cases would become public record.

By late 1996, Iowa Gov. Terry Branstad began promoting a program that he hoped would combat youth violence and juvenile crime; one of the goals was to provide appropriate sanctions. As one of the ways to achieve that, Branstad called for expanding and simplifying access to the names of juvenile offenders. He wanted to allow public access to names once juveniles were arrested rather than waiting until after a complaint was actually filed with the court.[82]

A *Des Moines Register* poll showed that the people in Iowa supported that change. Of the 815 Iowans over the age of 18 surveyed, 66 percent favored greater access to juvenile names.[83]

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[80] Ibid.

[81] Ibid.

[82] Branstad speech.

[83] Thomas A. Fogarty and Dawn Bormann, "Tough line on youth crime," *Des Moines Register* (Feb. 7, 1997): 1.

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"For 30 years in this country, public policy sought to shelter children from their own actions," Branstad said. "If they committed a crime, they were not held accountable — because they were supposedly too young to know any better."

But, Branstad said, "The results of this era of permissiveness have been disastrous. By not holding kids accountable for their actions, this country has managed to create a new generation of violent criminals. They understand how the system works and they use it to escape the consequences of their actions."

The first way to hold juveniles accountable is to increase access to the names of juvenile offenders. "At the time a young person is arrested for a serious crime, the public has a right to know. We are doing a disservice to the people of Iowa by shielding juvenile offenders from public disclosure," Branstad said.[84]

C. *The new law*

Although the Iowa Legislature changed a number of sections of the Iowa Code dealing with juveniles, two sections in particular apply to the Iowa news media. One new section to the Iowa Code now reads:

> Information pertaining to a child who is at least ten years of age and who is taken into custody for a delinquent act which would be a public offense is a public record and is not confidential under section 232.147.[85]

A section that was amended now reads:.

> A complaint filed with the court or its designee pursuant to this section which alleges that a child who is at least ten years of age and who has committed a delinquent act which if committed by an adult would be a public offense is a public record and shall not be confidential under section 232.147. The court, its designee, or law enforcement officials are authorized to release the complaint, including the identity of the child named in the complaint.[86]

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[84] Branstad speech.

[85] Section 232.19 new subsection 4, Iowa Code 1997. Section 232.147 of the Iowa Code deals with the confidentiality of juvenile court records.

[86] Section 232.28, subsection 10, Iowa Code 1997. Before it was amended, this subsection had specified that offenses ranging from aggravated misdemeanors to felonies would be a public record.

The Iowa Code defines a public offense as "that which is prohibited by statute and is punishable by fine or imprisonment."[87] Public offenses can range from serious felonies[88] to simple misdemeanors.[89]

However, the same law that grants access to juvenile information includes a section that outlines which information may be confidential and will be subject to sealing.[90]

D. *Iowa newspapers put the new law into practice*

Even though the change in the law greatly expanded the boundaries for naming juveniles involved in public offenses, few newspapers have expanded their coverage of juveniles to meet those boundaries. In fact, Iowa newspaper editors have examined the issue at great length, have met with newsroom staffs and with persons outside the newsroom and some have drafted policies on dealing with the names of juveniles. Their policies range from not printing the names of any juveniles to printing the names of all juveniles, but most newspapers by far fall into a middle category of printing only the names of those involved in more serious crimes. Their reasons for their policies are as varied as the policies themselves.

Iowa newspaper editors have a variety of relationships with their local police departments. In some communities editors have had difficulty getting the names of the juveniles from police or court agencies. In other communities, editors will discuss with the police whether to run the names in some cases.

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[87] Section 701.2, Iowa Code 1997

[88] Section 701.7, Iowa Code 1997.

[89] Section 701.8, Iowa Code 1997.

[90] Section 232.149, subsection 2, Iowa Code 1997. It says: "Records and files of a criminal or juvenile justice agency concerning a child involved in a delinquent act are public records, except that release of criminal history data, intelligence data, and law enforcement investigatory files is subject to the provisions of Section 22.7 and chapter 692 and juvenile court social records, as defined in section 232.2, subsection 31, shall be deemed confidential criminal identification files under section 22.7, subsection 9. The records are subject to sealing under section 232.150 unless the juvenile court waives its jurisdiction over the child so that the child may be prosecuted as an adult for a public offense." Section 22.7 is the confidential records section of Iowa's open records law.

Robin Delaney, editor of *The Daily Democrat* in Fort Madison, a community that also houses a prison, said her newspaper uses the names of all juveniles ten years of age and older involved in both misdemeanors and felonies. The decision to print names was based, she said, on public opinion, the newspaper's own opinion and the deterring effect of printing those names. "And we felt that it was easier to go with the law than to play judge."[91]

The editor of the *Marshalltown Times-Republican*, Jim Stern, said his newspaper is printing the names of all juveniles it has access to and that it prints all of the court news. The decision to print the names of juveniles was, he said, "no decision at all."[92]

Another newspaper that tries to print all of the names is the *Anamosa Journal-Eureka*, in a community that also houses a correctional facility. News editor Jennifer Hughes said the newspaper didn't run the names before because it couldn't. "Now we can. We didn't put a lot of thought into it." People like to know who is involved in crimes and before the law changed on July 1, she sometimes got phone calls from people asking for the name of someone who was listed only as a juvenile in a news story. "I couldn't tell then; now I can."[93]

On the other end of the spectrum Lori Nillers, editor of the *Daily Freeman Journal* in Webster City, said her newspaper continues to print the names of juveniles involved in traffic violations, which had already been public record, but has not begun printing the names of any other juveniles. Her community differs from Fort Madison in that there is no "public sentiment or support for using names."[94] No specific poll was conducted to make that determination; it was just the feeling staff members had in a few conversations with members of the public.

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[91] Robin Delaney, editor of the *Daily Democrat* in Fort Madison, Iowa, telephone interview by author November 7, 1997.

[92] Jim Stern, editor of the *Marshalltown Times-Republican*, Marshalltown, Iowa, telephone interview by author November 5, 1997.

[93] Jennifer Hughes, news editor of the *Anamosa Journal-Eureka*, Anamosa, Iowa, telephone interview by author November 10, 1997. However, her newspaper is not always clear on what age the juvenile is. An item on page 3 of the Thursday, October 23, 1997, issue of the *Anamosa Journal-Eureka* concerned some vandalism to a local school. The last paragraph said, "Arrested were Judson Paul Barnes and juvenile Nicholas L. DeCoteau, both of Anamosa."

[94] Lori Nillers, editor of the *Daily Freeman Journal* in Webster City, Iowa. Telephone interview by author November 10, 1997.

Some of the editors expressed reservations about a law that allows the printing of the names of ten-year-olds who have not even been charged with a crime, but who have only been taken into custody. Mark Bowden, managing editor of the *The Gazette* in Cedar Rapids said he is troubled by the fact that the newspaper is allowed to print the names of those taken into custody or who have been charged, but the paper might not have access to the disposition of the case because access to juvenile court records is uneven and some records are subject to sealing. "I don't think those who passed the law thought about it. There could be a real injustice there." He wondered if the next legislative session would clear up that question.[95]

The change in the law had not been sought by newspapers, but had been pushed by Gov. Branstad. "It is a strange law," said Larry Smidt, editor of *The Messenger* in Fort Dodge. "Government seldom runs out in front of the media with a law granting that kind of access." His newspaper has not changed its policy of running the names of youngsters involved in felonies, but will now include the names of ten-year-olds involved in felonies.[96]

Most editors did agree that having greater access to information was important, no matter what the newspapers choose to do with that information. "Personally and as a publisher, I think it is a positive step forward," said John K. Hall, the publisher of the weekly *Times Plain Dealer* in Cresco. Because government is more likely to restrict access than to grant greater access, Hall saw this law as an important step in public access. His newspaper hasn't yet come across the names of any ten-year-olds involved in crimes, but it will and has printed the names of twelve-year-olds and older involved in major crimes.

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[95] Mark Bowden, managing editor of *The Gazette*, Cedar Rapids, Iowa, telephone interview by author November 3, 1997.

[96] Larry Smidt, editor of the *Fort Dodge Messenger*, Fort Dodge, Iowa, telephone interview by author November 3, 1997.

"The reason is that we just feel that people need to be aware of major crimes committed by the young," Hall said. Before the law changed, newspapers had to jump through major hoops to print the names of youngsters involved in some of the major crimes.[97]

"We are glad that the door is open for these names," said John Smalley, editor of the *Mason City Globe Gazette*. He recently moved from Wisconsin — which has a much more restrictive policy regarding the release of juvenile names — to the editor's post in Mason City. He said it is good to have that free flow of information, even if the newspaper chooses not to use it. His newspaper is handling the names the same way many Iowa newspapers are, printing the name if the juvenile is involved in a crime for which an adult's name would be used. However, the *Globe Gazette* has printed only a few names since the law went into effect.[98]

The Cedar Rapids *Gazette* has a similar policy, Bowden said. It will use a juvenile's name in a situation in which the newspaper would use an adult's name or if editors deem the situation to be newsworthy. As an example, Bowden said his newspaper would not normally print the name of someone charged with a stop sign violation; however, if someone had accrued 500 stop sign violations, that might be turned into a story. As for high profile cases, "they take care of themselves."[99]

"It wasn't a real stretch to develop this policy," Bowden said. "A lot of the log items are traffic offenses and juvenile names are already there." Bowden said the newsroom had some discussion about it and decided that if the staff deemed it newsworthy, the newspaper wouldn't be serving the reader if it left out the juvenile's name. "What value is it to a reader if a piece is missing, if we didn't say who it was?"

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[97] John K. Hall, publisher of the *Times Plain Dealer* in Cresco, Iowa, telephone interview by author November 7, 1997.

[98] John Smalley, managing editor of the *Mason City Globe Gazette*, Mason City, Iowa, telephone interview by author November 5, 1997.

[99] Bowden, interview.

The *Waterloo Courier* is another newspaper with a policy of publishing a juvenile's name where it would use adult names. Although editor Saul Shapiro said he doesn't know if he is totally comfortable with a law that allows the printing of names, he said the paper prints them because he said it seems the "specific intent of the law is to print these names. It seems to be the will of the Legislature that we use those names; so it would seem to be the will of the people."[100]

The fact that the change was pushed so hard by the governor caused some newspapers to be surprised that local law enforcement agencies were not aware of the change in the law.

The Cedar Rapids *Gazette* sent a letter to the law enforcement agencies in the nearly two dozen counties it covers and explained how the newspaper interpreted the law and what it expected to be able to obtain from the police agencies. Several law enforcement groups then issued press releases about the new law that paralleled the *Gazette's* views. "We were pleasantly surprised," Bowden said.[101]

Not all newspapers have had the same success in dealing with their law enforcement agencies. More than one-third of the editors said they had run into some problems gaining access to the juvenile names. In some cases one agency would not release names or would not release all of the names. In another case the police may release the name but not the age, which the reporter then tries to get from the juvenile court, which does not want to release the age. The police in one city would not release names because they needed to "investigate the implications" of the law. In at least one county the police began to cooperate after receiving an opinion from the county attorney.[102]

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[100] Saul Shapiro, editor of the *Waterloo Courier*, Waterloo, Iowa, telephone interview by the author October 24, 1997.

The Courier's policy says, "The law states the names of those 10 and older are public record, regardless of the charge.

"Although the law will allow the Courier to print any juvenile arrest record, the Courier will use some discretion in the Daily Record. The names of juveniles 10 and older will be published only if the charge is consistent with those printed for an adult." Among the charges they will print would be assault, operating a motor vehicle while intoxicated and fourth-degree theft. In addition, reporters are expected to follow the juvenile cases and print the outcomes in their court log.

[101] Bowden, interview.

The editor of the *Mt. Pleasant News* said that his paper can get information from law enforcement agencies and from the county attorney but not from juvenile court staff. So the newspaper gets its information about juveniles from the county attorney's office. His newspaper is now in the process of drafting a policy to use serious misdemeanors and above, or offenses that land someone in district court rather than in magistrate court.[103]

However, law enforcement agencies that are aware of the law may not always pass that knowledge along to the youthful offenders. Bowden in Cedar Rapids said his first negative reaction to printing a name happened in September when the paper was threatened with a lawsuit by the parents of a boy whose name had been printed. The newspaper staff discovered that the parents had not been told about the change in the law. "It was clear that local officials had not described the law to youthful offenders. That also struck us as odd, somehow, that it hadn't trickled down to the youngsters that having their name made public was a ramification of being accused of a crime."[104]

Other newspaper editors said they have tried to inform both the public and the police agencies. Editors of the *Shenandoah Valley News Today* and the *Iowa Falls Times Citizen* say they are printing names and that they have run stories and editorials about the law.

Rex Troute, editor of the Iowa Falls newspaper, said the paper had its first negative public reaction to the law in August when it printed the name of a youngster who had shot his younger brother with a BB gun. The editor heard from the parents of the youngsters and ran letters to the editor from people who took issue with printing the names of juveniles and who claimed it takes a community to raise a child. "We ran an editorial that said no, it takes parents to raise a child." The youngster, it turned out, had been in trouble with the law before, but this was the first time that his name had been in the paper.

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[102] Unpublished poll on use of and access to juvenile names, conducted in late November and early December 1997 by the Iowa Associated Press Managing Editors; telephone interviews with editors.

[103] John Sloca, editor of the *Mt. Pleasant News*, Mt. Pleasant, Iowa, telephone interview by author December 3, 1997.

[104] Bowden, interview.

The Iowa Falls newspaper is running the names of juveniles involved in a serious crime. "If it is a serious enough crime, maybe running names may be a deterrent."[105]

The news editor of the Shenandoah paper said her paper is printing all of the names. She came to that decision after talking about it with the news staff and with the publisher and because the law now allows those names to be part of the public record. Then the newspaper ran a story and an editorial that helped explain its position. In addition, the staff discussed the new law with area law enforcement agencies and so far the newspaper has had good cooperation. Her paper has not yet had any negative reaction, but the editor said that might be because the community does not have many crimes or because the paper just has not printed the right name yet.[106]

The editor of the *Sioux City Journal* said the paper's general policy is not to run juvenile names unless they are charged with a felony. The law, however, concerns him because he is not sure how reliable access to names would be if the paper should decide to print all of the names that the new law says are public record.[107]

The *Dubuque Telegraph Herald* reporters do not always get the names of juvenile offenders without asking. And sometimes when law enforcement officials pass along names, they will ask the newspaper not to use them or to delay using them. But, the editor pointed out, names of juvenile victims are available as they have been for some time. The *Telegraph Herald* only prints juveniles charged with a felony.[108]

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[105] Rex Troute, editor of the *Iowa Falls Times-Citizen*, Iowa Falls, Iowa, telephone interview by the author November 7, 1997.

[106] Julie Dinville, news editor of the *Shenandoah Valley News Today*, Shenandoah, Iowa, telephone interview by author November 7, 1997.

[107] Larry Myhre, editor of the *Sioux City Journal*, Sioux City, Iowa, telephone interview by author October 27, 1997.

[108] Brian Cooper, editor of the Dubuque *Telegraph Herald*, Dubuque, Iowa, e-mail interview by author October 27, 1997.

The *Oskaloosa Herald* has decided to hold off on printing juveniles' names until the juveniles have been charged.[109]

Other newspapers say they take the information the authorities give them and print all of it in a police and court log column. Gerald Blue, editor of the *Fayette County Union*, said that in thirty years his newspaper has never deleted an item from the reports the paper receives from the West Union Police Department or Fayette County Sheriff's Office. He admitted, though, the paper is probably not getting all of the news. "But we're not seeking out the names of ten-year-olds, either."[110]

Troute, of the Iowa Falls newspaper, said that his newspaper does not want to play favorites, but he admitted that sometimes reporters do call the police department for more particulars on a specific crime. The reporters want to be comfortable with all of the details before the name is published. On the other hand, Iowa Falls does not have that much crime and he did not think the paper would use the law that much.[111]

The acting editor of the *Atlantic News-Telegraph* said his newspaper also works closely with the police department and makes decisions on a case-by-case basis. He said he is not bothered by printing the names of those who are fifteen, sixteen or seventeen, but he is more hesitant to print the names of those who are ten. However, it is a small enough community and he is willing to listen to the facts of the case before he makes a decision.[112]

The law, however, brings other concerns to editors like Smalley in Mason City. He said it is not a one-size-fits-all kind of law. Although he said he can understand why the Iowa Legislature passed this law in its attempt to hold juveniles accountable, he thinks there should be allowances for the youngster who has made just one mistake as opposed to the youngster who is a habitual criminal. "Are we going to be adding further damage to an already disturbed young person?"

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[109] Unpublished APME poll.

[110] Gerald Blue, editor of the *Fayette County Union*, West Union, Iowa, telephone interview by author November 7, 1997.

[111] Troute, interview.

Another newspaper that prints only the names of youngsters involved in the most serious crimes is the weekly *Mitchell County Press-News* in Osage. Larry Kershner, the news editor, said he is wondering, though, whether to begin running the names of repeat offenders. He has been in the news business twenty years and said he did not rush to expand his coverage to the limit allowed by the new law "because you don't make a drastic policy change overnight."

He recalled one young man who was constantly in trouble with the law several years ago, but who was too young to have his name in the paper. When he was finally old enough, the paper printed his name. "The young man settled down, but I don't know if it was maturity or whether we started printing his name." Kershner does wonder if there is a deterrent effect in running the names of those who are chronic offenders, but he is clearly concerned about the impact of running the names of those who make only one misstep. "If we ran the name of someone with only one offense, maybe he wouldn't have gotten a scholarship."[113]

The editor of the *Washington Evening Journal* said he is also concerned about printing the names of those as young as ten. He said he feels a little more comfortable starting with people at age thirteen or fourteen, although he, too, said that if the crime is serious enough his newspaper will run the juvenile names. He is concerned about how the juvenile will be affected if the juvenile's name is published. As a result, his newspaper and others within its group are working on a policy.[114]

One editor who chose a different approach asked why the press should be the vehicle responsible for getting the names of young criminals out into the community. Mike Beck, managing editor of the *Iowa City Press-Citizen*, said his paper's policy has not changed with the law — it will print the names of those under 18 only if they are involved

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[112] Doug Rossell, editor-at-large for the *Atlantic News Telegraph*, Atlantic, Iowa, telephone interview by author November 3, 1997.
[113] Larry Kershner, news editor of the *Mitchell County Press-News*, Osage, Iowa, telephone interview by author November 10, 1997.

in a serious felony and even then the paper will examine them on a case-by-case basis. As for publishing the names of all youngsters whose names would be public record under this law, Beck said it could be an endless list.

"To some extent, that is not my problem; that's Branstad's and the Legislature's problem. We are not here to solve the juvenile crime problem for them." Beck agreed that the public needed access to as much information as possible and he pointed out that the names of juveniles are not just open to the newspapers; the names are public information for everyone.

He questioned the "legitimate, compelling interest in running" the names of all juveniles who would fall under this law. He said it was "chilling" to think the press should run the names of all of those juveniles and somehow help to reduce the level of juvenile crime. "That's an awfully heavy responsibility for the press. I'm not willing to accept that kind of responsibility."[115]

Although some might argue that under the social responsibility theory of the press a newspaper should print those names,[116] Rep. Lamberti could not point to any specific studies the Legislature used to show how that publication of names would deter juvenile crime.[117]

III. Discussion and Conclusions

Iowa editors generally were thrilled to have additional access to information. But editors prefer being in the position where they can choose which information to use, and editors are making those choices carefully.

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[114] Brooks Taylor, editor of the *Washington Evening Journal*, Washington, Iowa, telephone interview by author October 13, 1997.

[115] Mike Beck, managing editor of the *Iowa City Press-Citizen*, personal interview by author, Iowa City, Iowa, October 31, 1997.

[116] Fred S. Siebert, Theodore Peterson and Wilbur Schramm, *Four Theories of the Press*, University of Illinois Press, (1956).

[117] Lamberti, e-mail correspondence.

Iowa newspaper editors have been handed an opportunity to use the names of every youngster ten and older in the state who has just been taken into custody — not even charged — in connection with some offense. Even though the Iowa Legislature has greatly expanded the boundaries for the state's editors, they are not coming anywhere close to taking full advantage of using those names — nor do they intend to any time soon. Editors are not sure how many of the available names they actually use, but it seems very likely that only a fraction of the names are getting into print.

While some newspapers have based their decisions not to run all of the names on how much space such a listing might require, most of them are turning to ethical concerns as they consider the boundaries they want to reach in setting a new policy. Most of the editors also said that, in spite of what the FBI statistics show about the increase in juvenile crime in Iowa, their communities do not have much juvenile crime and they do not print many names. One newspaper editor had not yet even thought about a policy because his paper had not had an occasion to consider printing a name.[118]

Most of the newspaper editors expressed reservations about using the name of a ten-year-old unless that youngster has been involved in a serious crime. Some editors said their boundaries stop before they will print the name of any ten-year-old. Many editors have set their boundaries by refusing to print lesser crimes or the first crime a youngster commits. Helping them to decide on those boundaries were concerns such as the very real possibility that they might not have access to the disposition of the case and whether it is fair to print the name of a child who will never make that kind of a mistake again.

Many of these editors said that even before the change in the law, they would have used the name of a ten-year-old who was involved in a major crime if they could have legally obtained the name. And with the law that drops the age to ten, many of these same editors said they would seriously consider printing the names of those younger than ten if the youngsters are involved in extremely serious crimes.

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[118] Randall Larimer, publisher of the *Bedford Times-Press*, Bedford, Iowa, telephone interview by author November 7, 1997.

Although only one newspaper had made the decision not to print the names of any juveniles, many of the smaller papers have printed very few names — or no names — since the law went into effect. Most newspapers, however, will print at least the names of those involved in the most major crimes. Although editors did not mention laws in other states, those who do not use names as young as ten are in line with the lesser access available in most other states. A handful of newspapers will make decisions on a case-by-case basis. Even with such a permissive law, it was apparent that most newspapers weighed societal concerns as they made their decisions.

Anne Bunz of the Youth Law Center said it was good news to hear that newspapers were not using all of the juvenile names to which they had access.[119]

"It flies in the face of what people think of newspapers, that they just want to print anything salacious," said Bill Monroe, executive director of the Iowa Newspaper Association.[120]

It was perhaps surprising to discover the level to which Iowa newspapers, especially smaller dailies and nondailies, consulted with their local police departments when deciding whether to print a juvenile's name in a specific situation. Although sometimes the police made the request, at other times it was the editors who sought additional information and suggestions from the police on whether to print the juvenile's name.[121]

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[119] Bunz, interview.

[120] Bill Monroe, executive director of the Iowa Newspaper Association, Des Moines, Iowa, telephone interview by author October 2, 1997.

[121] Jeff Oakley, editor of the weekly *Audubon County Advocate Journal*, telephone interview by author October 24, 1997. Although he said his paper prints all names of those 16 and over, a police item on page 6A of the Friday, October 17, 1997, *Audubon County Advocate Journal* had said "A 16-year-old Kansas male was arrested Oct. 7 and charged" with several charges, including taking a motor vehicle without the owner's consent. The youngster had been referred to juvenile court. Oakley admitted that this item was an exception to his rule of printing the names of those who are at least sixteen. He said that he has great access to police records, and that he did know the identify of the youngster in question, but local police had explained additional circumstances surrounding the incident and had asked him not to print the name.

A future study could focus on the relationship between Iowa newspapers and local police departments to see just how closely newspapers cooperate with police department suggestions about running specific items and how often newspapers seek advice from the police about running names of juveniles.

A small number of editors questioned the Legislature's intent in passing S.F. 515. Shapiro of Waterloo said he ran the names of juveniles involved in serious crimes because "it was the will of the Legislature that we run these names."[122] Beck of Iowa City wondered why it should be the responsibility of the media to serve as the deterrent to increased juvenile crime.[123] The question they are facing is whether printing the names of juveniles involved in crimes really serves as a deterrent. While the editors have many views on whether they can deter crime with some publicity, even the experts do not agree on whether the publicity can deter crime.

Others editors had concerns about having access to the disposition of a case. And others were concerned about publishing the name of the youngster who made the only mistake he was going to make in his life.

Although the editor's age and years of experience were not part of this study, either, it seemed that editors with greater experience were less likely to use the names of all juveniles. Some editors mentioned they remembered youngsters over the years who did commit a small crime, but who then became good students, received scholarships to college and ended up in good jobs. Those editors wondered how that scenario might have changed if the paper had printed the juveniles' names.

The change in the law had not yet been in effect for six months at the time of this study, so it is too early to tell how many newspapers will change their policies and what direction those changes will take them. Some newspapers that have continued a policy of running only the names of those involved in serious crimes are just now beginning to think about a new policy for their newspapers.

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[122] Shapiro, interview.

Another area for possible future study would be the link between local media coverage of juvenile crime and a state legislature's actions in toughening up juvenile laws, as suggested in the Feld article. A Lexis-Nexis search for this paper revealed numerous editorials from newspapers across the country calling for passage — on either a state or national level — of legislation that increases access to the juvenile justice process. Few editorials said there was already too much access.

And yet another area to watch is the juvenile crime statistics. All accounts show them increasing dramatically between 1985 and 1995. But the recent reports have juvenile crime statistics leveling off. Will that affect state legislatures that are still considering increased access to juvenile records? Will that affect some of the newspapers' policies on running juvenile crimes?

What about access to the juvenile records? Will that become more standardized? The newspapers across the state have access to these records that ranges from total to nonexistent. One editor said he may seek an attorney general's opinion because the police in his community will not release names while those in surrounding counties do.[124] The change in this law has also made many editors more aware of the access they have had to juvenile court records in recent years, although they had not been pursuing those records.[125]

One concern is that some newspapers have not pushed for greater access, even though they may not choose to use that information. Perhaps they feel that because they did not push for the law, they will not grant the access it allows. Or perhaps some editors are quite willing to let the law enforcement agencies across the state set the boundaries for this change in the law.

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[123] Beck, interview.

[124] William Mertens, editor of the *Burlington Hawk Eye*, Burlington, Iowa, personal interview by author, Iowa City, Iowa, November 18, 1997.

[125] Unpublished APME poll.

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Revisiting Free Speech on Private Property in the New Information Environment: A First Amendment Response to the Private Ownership Model

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Revisiting Free Speech on Private Property in the New Information Environment: A First Amendment Response to the Private Ownership Model

It is clear that the new information environment will be developed and promoted by privately owned corporations rather than by publicly owned government organizations. The central role of the private sector as the owners and operators of the new digital broadband networks -- with the enthusiastic endorsement of Congress and the White House -- has been clear during the Clinton administration.[1] Although the *Telecommunications Act of 1996* was intended to remove impediments to competition between communications media and to dismantle the regulatory barriers that had prevented telephone companies and cable television companies from entering each other's businesses, the new law's effectiveness in achieving these objectives is as yet unproven.[2] Its effects, at least in the short term, seem at odds with its intentions, according to industry analysts, resulting not in competition between industries, but in conglomeration within industries: "What many thought would actually be competition and convergence has actually been consolidation."[3] This concentration of ownership among networks decreases the opportunities for potential speakers to find access to the new communications systems.[4] As the new communications landscape becomes increasingly dominated by a relatively few large telecommunications corporations and media conglomerates, fewer voices are likely to be heard and even less diversity is likely to result from the traditional media players.[5] Structural changes in the media and telecommunications industries mean that the basic assumptions about who will have the opportunities to create information resources and program content are circumscribed.[6] As one independent, public-access videographer observed: "You're talking about the marketplace, and basically the people who compete in the marketplace -- the people who are allowed to have access to the marketplace -- are the people who have the resources (the money) to get them there."[7]

At the same time that conglomeration has reduced the number of potential outlets, digital technologies blur the previously distinct demarcations between the traditional content providers (like broadcasters) and their traditional audiences, and between content providers as speaker and as content providers as conduit for the speech of others. In this new environment, where traditional consumers of information (audiences) can also become producers of information,[8] the old differentiation between 'speaker' and 'listener' which traditionally formed the basis for much First Amendment jurisprudence, is no longer so obvious or particularly useful. Despite the television industry's 40 year stranglehold over the means of production and distribution of programming content, its ability to set the standards which everyone accepts is eroding. Whereas individuals may have once assumed that only corporations could "make television" it is now no longer inconceivable for an individual to produce his or her own multimedia for a Web site or to shoot, edit, and market video productions independently.[9] Where once there existed no other models of video communication as reasonable guidelines, the new digital information and communications technologies now facilitate such communication.[10]

In light of new capabilities, users are faced with a question: Who is going to produce our culture? Herbert Schiller, among others maintains that America's cultural future is in the hands of the likes of Time-Warner, Disney and General Electric: "Certainly these are the determining voices in the current media scene."[11] Are we going to produce our culture ourselves or are we only going to consume what other people put out there? Unfortunately as cable public access producer Brian Springer points out, "People aren't used to producing culture. Culture is consumed instead of practiced . . . television has always been the great receiver mode."[12]

These parallel developments -- increased corporate conglomeration as a result of structural changes in the industries and expanded individual communications capabilities that result from multimedia and interactive digital technologies -- have been described as constituting a "challenge to existing First Amendment paradigms."[13] While the position of government as technological innovator and heavy investor in network research and development remains critical,[14] its utility as a regulator of these new networks (particularly in the post *Telecommunications Act* era) has been called into question by proponents of deregulation and marketplace competition.[15]

This paper argues that government does have an important and clearly defined role with regard to structural regulation of the new communications technologies -- a role grounded in the First Amendment and firmly rooted in the protection of free expression for all participants in the new information environment.[16] The ability of government to ensure system access to the new information and communications networks is now a primary issue for communication policy makers and regulators, as new capabilities call into question existing policy.[17] "The unanswered question is [how to] balance the First Amendment interests of the owners of the new communications networks against the interests of the individuals, groups and organizations that will seek to access their technology."[18] The answer to this pressing question is unlikely to be found in established communications policy. Existing regulatory models (premised on the particular characteristics of a given technology or on analogy to existing telecommunications technologies[19]) do not prove helpful in formulating new policy for an information environment that is amorphous and changeable and difficult to define or even describe.

The objective of this paper is to examine how the First Amendment doctrine of free speech on private property can provide grounding for new structural policy in light of this new environment -- particularly for policy to ensure that end users have access to both a variety of information sources as well as access to the means of disseminating their own information to others.

The public sphere in the new information environment

Jurists and scholars have repeatedly emphasized that social discourse in the public sphere -- particularly political discourse -- is a necessary component of a democracy: "the vital fluid of a free, participatory society."[20] Certainly the need to protect freedom of speech and ensure that opportunities exist for those who would speak to freely express their ideas is essential. This is necessary not only to sustain an informed electorate, but as Thomas Emerson wrote, to provide for participation in the decision-making process: "The right of all members of society to form their own beliefs and communicate them freely to others must be regarded as an essential principle of a democratically organized society."[21] If freedom of speech can be cast as a positive right,[22] it follows that a strong government interest exists in protecting speech freedoms where people congregate. Free speech rights are illusory if people are prevented from expressing themselves and carrying on reasonable debate where they gather. "Unless there's some public sphere that really is public -- which people can access easily and in which they're free to say whatever they want to say . . . then it isn't really public access. But if it's possible to entertain, in this public sphere, the range of ideas that exists in our society, then it's fine if some of it is foolish or boring, or not particularly well edited."[23] Perhaps Justice Thurgood Marshall summed it up most

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succinctly: "When there are no effective means of communication, free speech is a mere shibboleth."[24]

And while it is tempting to look back on halcyon days of robust political debate during the eighteenth and nineteenth centuries, when voters congregated in town halls across America, and suggest that the new information and communications technologies will revive widespread interest and participation in the public sphere,[25] such a conceptualization would be a mistake. Michael Schudson, for example, cautions that any 'golden age' of critical and rational discourse in American political culture is less likely to be resuscitated by new communications technologies than by a series of extraordinary political events.[26] This is not to say that a vibrant public sphere is undesirable or unattainable. However, the development of the public sphere has so far not been well served by such external sources of political and cultural information as the commercial media -- a model of journalism that some observers criticize for failing to provide "mobilizing information" (information that could foster political activity among its readers and viewers) while focusing instead on developing a market for its products.[27] It is perhaps in this respect that the new communications and information technologies can make a contribution towards reviving Tocqueville's notion of media as creators of associations or communities, rather than creators of markets.[28] Certainly a functioning public sphere depends on participants being free not only to express themselves but also to speak in a setting where others may hear their ideas and opinions. Lawrence Tribe has aptly summed it up: "If you have free speech but you can't do it where most people are, you don't have free speech."[29]

At the end of the twentieth century the most familiar and convenient location where most Americans gather in large numbers is no longer the village green, the central marketplace, or the downtown street corners, but rather the suburban shopping mall.[30] As such, the status of the mall -- which generally represents private property -- as a forum for free speech has come under scrutiny.[31] As one commentator points out: "The old notions of what constitutes a public forum are being reconsidered . . . these forums are being 'privatized' as people increasingly abandon such public places as the traditional town square and downtown business district for privately owned or managed venues."[32] And if malls have eclipsed the downtowns as the locales where most Americans spent much of their free time at the close of the twentieth century, the newest place to congregate as we look to twenty-first century is cyberspace.

The judicial doctrine of free speech on private property, which has developed out of the public forum doctrine,[33] provides policymakers with a structural framework that does not rely on architectural or technological characteristics that circumscribe current policy models. As such, it offers a means to incorporate First Amendment values and principles in communications policy for an information environment that is undergoing rapid, far reaching change with unforeseen results.[34] This precedent is important during a period of technological upheaval because it enables us to maintain continuity with both the values of the past and with specific rules of existing legal doctrine.[35] As Justice Breyer pointed out in Denver Area Educational Telecommunications Consortium Inc. v. FCC, "The history of this Court's First Amendment jurisprudence . . . is one of continual development, as the Constitution's general command that 'Congress shall make no law . . . abridging the freedom of speech, or of the press,' has been applied to new circumstances requiring different adaptations of prior principles and precedents."[36]

Free speech in the new information environment

The social places of cyberspace provide the settings for debate, congregation, and myriad forms of self-expression.[37] These represent gathering places for individuals who freely come together to create communities and to reproduce social worlds [38] -- people with an almost unimaginable range of political, artistic, educational, and commercial interests.[39] The exchange of electronic mail messages, the continuing discussion on computer bulletin boards, listservs, news groups and on-line fora; the diverse range of electronic commerce; and the vast searchable collection of information resources on the World Wide Web all embody the free-speech attributes of a traditional commons or village green, where access to resources is available to the widest number of individuals.[40] For many users the virtual on-line gatherings via the Internet supplement (or have already replaced) even the real world fora (like shopping malls) as accessible meeting places where they can conduct political debate, find educational opportunities, carry on commerce, and entertain themselves.[41] Importantly these on-line fora also offer speakers new communications capabilities that can help foster the conditions needed for a revitalized public sphere -- one that is open to popular participation and one that encompasses widespread and rational discourse.[42]

Free speech rights and property rights

The First Amendment protects against governmental interference with speech. It does not preclude *private* abridgment of freedom of expression.[43] But as private property supplants public property as the base for community activity[44] and as privatization of access to public information occurs with increasing frequency,[45] the restriction of reasonably expressive behavior on private property has seriously "diminished the validity of the guarantee of free speech as set forth in the First Amendment."[46] This is particularly true where freedom of speech is abridged because access is restricted or denied to property that serves as a forum for expression.

Public forum doctrine: The public forum doctrine developed in a series of court decisions, beginning in the late 1930s.[47] The doctrine is typically applied to government-owned property where expression has traditionally been allowed such as parks and streets. But the doctrine has also been used to limit government restrictions on speech in places that do not have the public nature of a street corner or park.[48] In some cases a version of this doctrine has been applied to private property like shopping malls.[49] In light of private corporate control of both the new communications networks and the increased privatization of information provided via those networks, the latter category of decisions provides a useful theoretical basis for a new policy framework for new communications technologies.[50] As the cases below illustrate, the threats to free speech in the privately owned malls and in the privately owned information environment are strikingly similar. These similarities point to a need for a policy framework that acknowledges that the new interactive, broadband communications systems represent the new public fora -- and as such will require safeguards to protect speech freedoms.[51]

In one of the first cases that the Supreme Court heard concerning an individual's freedom to exercise First Amendment rights on private property, the Court ruled that the owners of a company town could not prohibit the distribution of literature on the sidewalks. In Marsh v. Alabama[52] the court held that a privately owned company town was the functional equivalent of a public business district, with the same protections for speech.[53] The governing of a company town by private property interests was clearly a public function, bringing the restraint upon the distribution of literature on the streets of the company town within the framework of the First Amendment. The case involved a Jehovah's Witness, Grace Marsh, who was arrested for violating state trespass laws after she had distributed religious literature in the central business district of a company-owned town in Alabama.[54] The Court had to determine to what extent the owners of the town could control its property and to what extent they could prohibit free speech on that property. The Court ruled that since the owners of the company town were performing all the functions of a municipality, they essentially stood in the shoes of the state with regard to preserving freedom of speech: "Whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such a manner that the channels of communication remain free."[55] With Marsh, the Court initiated the "public function" state action theory. This rationale holds that if private parties carry out inherently governmental functions, these functions may be deemed public, as if the state itself had performed them.[56] In Marsh, the Court also set out two general principles regarding free speech on private property: First, when a private property owner opens his land for general public use, his private property rights are diminished and circumscribed by the constitutional rights of the invited public; and second, when the rights of property owners must be balanced against the rights of individuals to exercise free speech, the individuals' rights "occupy a preferred position."[57] Justice Hugo Black wrote:

> Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. Thus, the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since

> these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation. And, though the issue is not directly analogous to the one before us, we do want to point out by way of illustration that such a regulation may not result in an operation of these facilities, even by privately owned companies, which unconstitutionally interferes with and discriminates.[58]

The court also emphasized the need of citizens in a democracy to have access to uncensored information in order to make informed decisions. In language that Michael Myerson suggests could well pertain to the users of telecommunications networks today, Justice Black stated:

> [The residents of company towns] are free citizens of their State and country. Just as all other citizens they must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored. There is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen.[59]

Access cases: In the intervening half century since Marsh, the shopping mall and the corporate business complex have supplanted the company towns and the streets and parks of municipalities as public areas where people congregate. In these new gathering places private property rights exist in tension with First Amendment rights of free speech.

In 1968, in Food Employees Union v. Logan Valley Plaza the Supreme Court compared the shopping center to the company town and found them strikingly similar with regard to free speech protections.[60] The extent of the public's invitation to the property was identical, and therefore the speakers' access to both areas could not be denied. The issue in this case was whether the owner of a privately owned shopping center could prohibit certain persons from picketing a supermarket located in the shopping center.[61] The Court found that a state trespass law could not be applied to prohibit picketing. Justice Marshall wrote in a majority opinion that such laws could not be applied on the grounds that picketing was an invasion of private property because the shopping center in this case was "clearly the functional equivalent of the business district of Chickasaw involved in Marsh . . . [and] the shopping center serves as the community business block."[62] The state, therefore, could not exclude the public from exercising its First Amendment rights by applying a trespass law.

Based on the purpose and use of the property, the nature and extent of the public's invitation to enter and shop, and the relation between speech and the use of private property, the Court said that it was not necessary for the shopping center to take on *all* the attributes of a municipality before it could be regarded as an appropriate forum for individuals to exercise free speech.[63] The owner, having made his property open to the public -- having invited the general public onto his property -- could not argue that his privacy or exclusive possession and enjoyment were impaired by an additional group of people on his premises conducting an orderly speech activity. However, the Logan Valley decision narrowed Marsh by sanctioning only free speech related to the functioning of a shopping center.[64] The Court also concluded that there was no alternative forum for the picketers to convey their message.[65]

Four years later, in Lloyd Corp. v. Tanner, the Court chose not to protect the dissemination of information at a privately owned shopping center where the speech was unrelated to the commercial use of a the property.[66] Protesters of the Vietnam War tried to distribute handbills on the premises of a privately owned shopping center against the wishes of the owners. The federal district court in Oregon issued a permanent injunction against the owners, restraining them from interfering with the distribution of the leaflets. The Ninth U.S. Circuit Court of Appeals affirmed, but the Supreme Court reversed. The Court concluded that the shopping center did not have all the attributes of a municipality.[67] Although the dissenters had pointed out that the shopping center had its own police force and was zoned as an integral part of the community, Justice Powell adopted a strict "public function" test.[68] The Court compared its 1968 Logan Valley decision and distinguished Tanner on two factors mentioned in Logan Valley: first, speech activity must be related to the use of the shopping center, and second there must be no other available forum for the communicators to convey their messages. Lacking a close connection between the speech and the site, a shopping center would not be considered the functional equivalent of a company town: "There is no open-ended invitation to the public to use the Center for any and all purposes."[69] The distribution of leaflets in Tanner was declared unrelated to the public's invitation to enter and shop. The Court decided the protesters could have used public property to express their views.[70]

Justice Marshall dissented. He pointed out that the shopping center had its own police force and was zoned by the city of Portland to function as a public business district.[71] Marshall also questioned whether the owner was unreasonably burdened by the speech activity on his property: "It is undisputed that some patrons will be disturbed by any First Amendment activity that goes on, regardless of its object. But, there is no evidence to indicate that speech directed to topics unrelated to the shopping center would be more likely to impair the motivations of customers to buy than speech directed to the uses to which the Center is put."[72] Marshall pointed out the need for balance between the conflicting free speech rights of individuals and property rights of owners: "We must remember that it is a balance that we are striking -- a balance between freedom to speak, a freedom that is given a preferred place in our hierarchy of values, and the freedom of a private property owner to control his property. When the competing interests are fairly weighed, the balance can only be struck in favor of speech."[73] In language that seems to foretell the current situation for users of the new information and communication technologies, Marshall insisted: "For many persons who do not have easy access to television, radio, the major newspapers, and other forms of mass media, the only way they can express themselves to a broad range of citizens on issues of general public concern is to picket, to handbill, or to utilize other free or relatively inexpensive means of communication.[74]

In 1976 the Supreme Court seemed to overturn Logan Valley. In Hudgens v. National Labor Relations Board,[75] the Court decided that reasonable restraints imposed by a privately owned shopping center was not governmental action and therefore not constitutionally prohibited. Picketers at a store at a large retail mall in suburban Atlanta filed an unfair labor practices charge against the mall's owner when they were denied the right to picket one of the stores in the mall. The NLRB had based its decision on Logan Valley and ruled that the picketers were entitled to picket because the activity was directly related to the use of the center. The Fifth Circuit Appeals court affirmed.

The Supreme Court reversed. Justice Stewart termed a "truism" the notion that the First Amendment protects speech only against state interference. While statutory or common law may, in some situations, extend protection against a private corporation or person who seeks to abridge the free expression of others, Stewart emphasized that the Constitution itself provides no such protection.[76] He then stated that Logan Valley had not survived the 1972 Tanner decision.[77] Logan Valley had permitted picketing that was related to the purposes for which the shopping center was used. Since speech content was irrelevant to First Amendment decisions (and the Logan Valley decision would seem to have permitted shopping center owners to prohibit or allow speech on the basis of its content),[78] the key issue in Tanner had not been content -- rather it was that the Court rejected altogether the notion that a shopping center is the functional equivalent of a municipality. As a result the shopping center would not be governed by the constitutional prohibition against governmental regulation of the content of speech.[79]

Once again Justice Marshall dissented:

> In Logan Valley we recognized what the Court today refuses to recognize -- that the owner of the modern shopping center complex, by dedicating his property to public use as a business district to some extent displaces the 'state' from control of historical First Amendment forums, and may acquire a virtual monopoly of places suitable for effective communication. The roadways, parking lots, and walkways of the modern shopping center may be as essential for effective speech as the streets and sidewalks in the municipal or company-owned town.[80]

The changes in communications capabilities have resulted from the implementation of new information and communication technologies along with the concentration of ownership of telecommunications outlets and transmission conduit make Marshall's description of mall owners in the mid-1970s germane to a discussion of structural policy today. His words could well apply to telecommunications network owners in the 1990s. Despite legislation designed to foster convergence and competition, most residential telephone subscribers in the U.S. continue to obtain local telephone service (and on-line access) from a monopoly service provider. Similarly, the vast majority of cable systems operate without competition. Access to these networks is no less essential for effective speech that the access under scrutiny in Hudgens. Marshall continues:

> "And while the owner of property open to public use may not automatically surrender any of his autonomy interest in managing the property as he sees fit, there is nothing new about the notion that the autonomy interest must be accommodated with the interests of the public. As this Court noted some time ago, albeit in another context: 'Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created.'"[81]

In 1980 the Supreme Court held that the California Constitution protects the rights of free speech and petition, reasonably exercised in privately-owned shopping centers. In Pruneyard Shopping Center v. Robins,[82] the Court found that the free speech and freedom to petition provisions of the California Constitution[83] protected a right of access in the common areas of a privately owned shopping mall. These fundamental rights "justified reasonable restrictions on private property rights."[84]

The case concerned high school students who entered the Pruneyard Shopping Center and solicited signatures for their petition against a United Nations resolution condemning Zionism as racist. The owners, who had traditionally and strictly enforced a policy prohibiting any visitor or tenant from engaging in any publicly expressive activity that included the circulation of petition that was not directly related to the shopping center's commercial purposes, asked the students to leave. They students left and brought suit. The trial court rejected the students' request to enjoin the owners from denying them access. The First District Court of Appeals affirmed. The California Supreme Court reversed.[85]

The California Supreme Court decided that property rights must yield to certain public interests served by such governmental regulations as zoning and environmental laws. Since the state had the power to regulate private property for the public welfare, it could also require shopping center owners to provide public fora for individuals to exercise free speech.[86] The court stated that free speech was a goal at least as compelling as those interests served by zoning and environmental regulations. The court also concluded that because of the importance of the shopping center as a potential public forum, prohibiting speech activity as a shopping center impinged on constitutionally protected speech rights. In the court's view access to privately owned shopping centers would serve the purposes of enhancing and securing free speech -- a valid state interest.[87]

The court then balanced the state's interest in free speech for the public against the shopping center's owners' interests in controlling use of their property. The court concluded that when an owner invites the general public to enter his property, his interests in exclusive possession and enjoyment of his property diminish. On the other hand, the shopping center provides an essential forum for those exercising free speech rights. The court ruled that the *Tanner* decision had not defined any federally protected property rights; and even if it had recognized these types of rights, the state of California was free to regulate shopping malls for the valid state purpose of enhancing and protecting free speech rights. The California Supreme Court maintained that it could interpret the state constitution as requiring public access to shopping center property for free speech purposes without contravening the Federal Constitution.

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The court did however limit its holding to large shopping centers, attracting large crowds: "It bears repeated emphasis that we do not have under consideration the property rights of an individual homeowner or the proprietor of a modest retail establishment. As a result of advertising and the lure of a congenial environment, 25,000 persons are induced to congregate daily to take advantage of the numerous amenities offered by [the shopping center]."[88] Further, the public's right to exercise free speech on private shopping center property was subject to the owner's "reasonable regulations" of time, place and manner of the protected speech activities.

The shopping center owners contended that their property rights were infringed upon under the First, Fifth and Fourteenth Amendments. They appealed to the Supreme Court.[89] The Court rejected these arguments, pointing out that there was no evidence that the First Amendment activity interfered with the mall's normal business operations.[90] The Court also rejected the argument that Tanner prevented the state of California from requiring the owners of the shopping center to provide access to persons exercising their state constitutional rights of free speech and petition if adequate alternative fora were available. Since the mall, "by choice of its owner" was not used for purely personal use but opened to the public, the expressed views of the public are entitled to protection.[91]

The Court acknowledged that the right to exclude others is "one of the essential sticks in the bundle of property rights," but that not every "destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense."[92] The test for determining whether a state has unlawfully infringed on a landowner's rights under the 'takings clause' is whether the restrictions "force some people alone to bear the public burdens which in all fairness and justice should be borne by the public as a whole."[93] In this case, Justice Rehnquist concluded that the owners had not shown that their right to exclude others was essential to the use or economic value of the shopping center, so the restrictions imposed by the California Supreme Court was not a taking. The owners of the shopping center were free to establish time, place and manner restrictions on expressive activities.

The Supreme Court found that California's interest in securing free speech and petition rights at shopping centers was as fundamental as the owner's rights to control the use of his property. It applied a rational basis test: "Neither property rights nor contract rights are absolute . . . Equally fundamental with the private right is that of the public to regulate it in the common interest . . . the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the objective sought."[94]

The owners claimed that their constitutional right to free speech would be impaired if they were compelled by the state to make their property available to others for the purposes of speech and petition. They cited cases that proved that the government could not compel individuals to affirmatively express ideas against their will[95] or participate in the expression of an ideological message which they opposed.[96] The Supreme Court rejected this contention. By requiring a shopping center to provide a forum for members of the public to express themselves, the decision does not require that the shopping center owner affirm those expressions on its property. No government-approved view was being forced on the owners. The owners were free to disclaim endorsement of any opinion or idea expressed by members of the public. Because the shopping center was open to the public, it was deemed unlikely that any views expressed by a leafleteer would be confused with those views of the owners.[97]

Implications of the "access cases" for communications policy

The Pruneyard decision relied on the government's power to regulate property for legitimate purposes. There existed a compelling state interest in strengthening First Amendment rights. The state court balanced these rights against the asserted property rights of the owner of the shopping center and concluded that property may be regulated by requiring the owners to permit reasonably exercised speech and petitioning activity on their property. States may thus interpret their own constitutions to permit access to speakers on private property so long as the property owners are neither deprived of due process of law, nor have their property "taken" without just compensation.[98]

As a result of Pruneyard, speech in privately owned shopping malls is protected by the provisions of individual state constitutions. These state-level guarantees of free speech can be much broader than federal guarantees under the First Amendment. Since 1979 more than a dozen state appellate courts have confronted the issue of free speech on private property. A scorecard indicates that advocates for the autonomy of mall owners currently prevail over supporters of free speech.[99]

This erosion of rights at the state level is troubling, particularly as new information and communication technologies expand the individual's potential for expressive activities. If, as the access cases described above seem to indicate, expressive activity can be so readily curtailed by property owners in shopping malls -- the very locations described by many as the natural sites for co-mingling and public discourse, as this century's 'new' public fora[100] -- where *can* free expressive activity safely exist in an era of increased privatization of formerly public places? If people do not tend to frequent traditional public fora, it is reasonable to expect that First Amendment interpretation ought to adapt to reflect the new circumstances. In a democratic society if we wish to avert the atrophy and eventual demise of public discourse,[101] and prevent its agenda from being set solely by media conglomerates,[102] it also seems reasonable to ensure that a public forum is open to all ideas, whether or not those ideas are welcomed by property owners.[103]

While private property is said to reflect the social fabric of our society (and the absoluteness of ownership has long been modified to serve the collective needs of society at large),[104] there also exists an equally compelling need to preserve opportunities for free expression and social discourse, particularly political discourse at the grassroots level. In an environment where places and resources (both physical and virtual) that had previously been seen as public are now privately owned, a new balance would seem essential. Andrew Shapiro argues that if the speech that has been largely silenced on the street corners is not to disappear entirely, private interests must be prevented from controlling "every square inch of the Net." Shapiro articulates his vision of cyberspace using metaphors of community, congregation, and public spaces, where government intervention to provide a balance is necessary: "In the context of censorship [no government interference] sounds right. But in the context of ownership, it is wrong." [105] Curtis Berger concurs. He maintains that if social discourse in privatized space is to survive, self regulation will not suffice. New law is needed to maintain equity between conflicting pressures: "The law's choice becomes apparent: it must either allow new fora for political expression despite recalcitrant private ownership or remain silent as the traditional realm for grassroots political activity withers away."[106]

A vital public sphere cannot exist in cyberspace if the only discourse that will enjoy First Amendment protections is that which represent the functional equivalent of existing 'real world' fora.[107] If, as in Tanner, speakers in cyberspace are free to leaflet, but not on private property, where does that leave them in this privately owned and operated information environment? Joshua Meyrowitz observed more than a decade ago that the traditional electronic media had already lessened the importance of physical space to social discourse.[108] In the 1990s, logging on to the Internet has been described as the equivalent of "throwing on a coat and walking to the town square."[109] The relative importance of physical fora to public discourse is likely only to continue to diminish with the emergence of multimedia, interactive information and communications technologies. The need for policy, grounded in First Amendment principles, that both reflects this new sense of place and promotes access to the systems necessary for participation in that place is obvious.[110]

A doctrine revisited

In spite of the "mercurial"[111] nature of the judicial decision making involved, the doctrine of freedom of speech on private property, as manifested in the shopping center access cases contains useful precedent for policy designed to protect freedom of expression for both the owners and the users of the new information technology and communications networks. With respect to the conditions that would foster First Amendment protections over private property rights, cyberspace shares many of the same features as the shopping malls, particularly when viewed in a communications context. The Internet, for example, is already a common gathering place that serves multiple purposes for individual users. It is without a doubt the functional equivalent of a vast range of 'real world' information sites. On-line communities can now provide the information resources and communication capabilities one would find in any real world community -- libraries, museums, post offices, clubs, cafes, and places for debate and discussion.[112] When examined from this perspective, the privately owned networks of cyberspace take on many of the fundamental characteristics necessary for public discourse that were described as essential in Marsh, and emphasized by Justice Marshall in Logan Valley, and Tanner. Moreover the similarities between the uses and capabilities of cyberspace and the uses to which private property "clothed with the public interest" are put point to new interpretations of the First Amendment -- principally because these new resources and interactive communications capabilities offer more than simply new channels for communication, more convenient venues for group meetings, or old content in a new formats. These capabilities have the potential to extend the opportunities for participation in the public sphere to individuals and groups that were previously absent and traditionally silent.

Privatization of information and the increasing concentration of ownership among network providers and Internet service providers[113] brings into sharp focus the need to protect public fora in the new information commons. Using an analogy that is particularly germane to a discussion of access and First Amendment principles on private property, videographer Chris Hill argues if there is no public place set aside -- "a kind of electronic public park where people can say whatever they want and which they can access for free" -- what will result are 'information malls' which will be developed on the same model as the shopping mall. [114] These will look like a lot of open space, but anyone who wishes to use these locations is going to have to pay to get into the mall in the first place, and once there continue to pay to be a vendor.

Compared to the myriad expressive uses that are possible in the new information environment, the 'information mall' scenario is extremely restrictive. Such an approach limits not only the potential uses of the new communications capabilities by predicating all activity from a commercial basis, it also severely constrains who will gain entrance to the environment. Other public interest groups have recognized the threat posed by such privatization. Libraries for the Future, a group dedicated to the preservation of public libraries, advocates the preservation of an on-line information commons: "Library advocates have an opportunity to demonstrate the full meaning of the term 'public space.' As libraries adapt to new information technologies, providing users with resources over phone lines, through satellite transmissions, and by other new means of conveying information, it's important to fight to preserve space for this non-commercial and educational content. Public library advocates, who fight to preserve one of the most important public physical spaces, must also lead the fight for public virtual spaces as well."[115]

System access: Access to the traditional mass media systems by potential speakers has historically been constrained by frequency scarcity [116] and by economic monopoly.[117] In an analog world the limited availability of broadcast frequencies and cable channels meant that not everyone who wished to speak could have the opportunity to speak. Audiences had to content themselves with a limited and pre-sorted selection of programming content. Owners of the traditional mass media networks, like cable, have historically protested requirements that other speakers have access to their systems;[118] and there is reason to believe that owners of new services, like open video systems, will resist these requirements as well.[119] Network owners have argued that they should remain free to carry programming or other content of their own choosing. They have further pointed out that access requirements create a favored class of speakers -- those who have access to the communications media.[120] It is clear however that the new digital information technologies and communication capabilities overcome both these objections to systems access requirements. The enormous bandwidth that characterize digital, broadband networks will alleviate the capacity bottleneck. On fully switched, interactive communications systems there will be sufficient 'room' for everyone who wishes to speak.[121] And although this expansion greatly increases the number of potential voices that may be heard in the new information environment, the free speech benefits of the new communications technologies will largely depend on the widest possible access for individual speakers to these technologies.[122] While channel or frequency scarcity may no longer represent an impediment for potential speakers, absent policy that ensures that users have access to the system, scarcity of access opportunities are bound to become a serious barrier to participation in the new information environment.

Network owners have also resisted system access requirements on the basis that such rules resulted in compelled speech. Owners are unwilling to carry the messages of a particular speaker or group with whom they disagree; they maintain it is their right to deny access to their systems for the dissemination of such messages. In the history of at least one ubiquitous telecommunications network however -- the telephone network -- there is no automatic association or identification in the minds of the general public with the speech carried by a given network. At least one commentator points out that a *universal* access requirement would further reduce any connection between message and carrier, in much the same way that the telephone company now is removed from the messages carried in private telephone conversations.[123]

By inviting the public to use their property, the owners of telecommunications networks, to an even larger extent than the mall owners in the access cases, open their property for the purposes of communication.[124] The notion of inviting the public to use a telecommunications network, to subscribe to a communications service, to browse, to retrieve programming content and other information, to shop on line -- but *not* to express opinions, exchange ideas, and debate differences -- is patently absurd, particularly in light of the new interactive communications capabilities. Requiring that speakers use only public property to carry out their expressive activities in a privately owned environment seems to be the on-line equivalent of an eighteenth century 'let them eat cake' philosophy. The public has been invited to use the nation's telegraph and telephone systems since their inception; communication has been the very purpose of these networks. An access requirement simply extends this purpose. If the information commons is to flourish, it cannot exist solely for the personal use of the network owners.

Two-tiered approach: The solution to the tension between system access for individuals and an owner's ability to control property lies not in a choice, as some would characterize it, between totalitarian control or absolute laissez-faire.[125] A better approach might be a model that seeks first to ensure access to the new technologies for the largest possible number of users, and second to retain "a common space devoted to citizens' speech,"[126] while recognizing the property rights of the private sector. Allen Hammond sees the dangers inherent in the prevalence of property rights over speakers' rights: If access is continued to be denied on the basis of property, individuals with "insufficient wealth or [with] an unpopular message may be effectively precluded from speech."[127] Without policy and regulatory efforts to alleviate the imbalance, "small users and individuals would have access and speech rights solely at the sufferance of the network owner . . . the specter of private censorship unmediated by government becomes quite real."[128] Hammond suggests that regulatory and judicial preoccupation with access to private property by non-property owners *when viewed solely in its non-communications context* obscures the relevant issue with regard to free speech -- particularly the detrimental effects that the exercise of property rights have on the realization of free speech rights. The answer to owners' reluctance to guarantee systems access lies in a regulatory approach that revisits the doctrine of free speech on private property -- an approach that combines property rights with a guarantee of a public forum for individual users.

A dual-tiered topology for communications media that turns on access opportunities (from the perspective of the individual user) rather than on the specific medium and its technical characteristics is one such approach. Under this schema the various telecommunications media would be regulated as public fora, or as private fora that may be opened to the public, or both, depending on their degree of accessibility and economic dominance. The amount of industry competition present would be another useful determinant as to whether a given medium should be considered a public or private forum. These designations would exist apart from the media's actual private or public ownership status. For example, where the owner has monopoly control over the network (as with the telephone network), or where the owner has the economic clout to censor messages of others seeking access to the means of communication (as with cable networks and possibly broadcast television), public fora would be designated. Private fora would consist of companies that use dedicated or leased facilities to provide services to specialized users. These non-dominant companies would maintain full control over access to their systems and full editorial control of any speech conducted on their facilities. The public switched telephone network, for example, by virtue of its traditional common carrier status -- open to the pubic on a non-discriminatory basis -- would be regulated like a public forum, while on-line subscription services which elect to open their services to the public (but are not required to do so) would be treated as private fora open to the public.[129]

This framework also permits owners of networks that have been designated public fora to operate as information providers over their own facilities (or those of any other public forum) through a wholly owned but separate subsidiary. While some observers express skepticism over whether the courts would accept such a "multifaceted regulatory strategy" -- an arrangement that distinguishes the role of a network owner as conduit of speech for others and as a provider of information services (i.e., deeming the same firm a speaker for one purpose but not for others)[130] -- this reasoning does appear in Justice O'Connor's dissent in the 1994 Turner decision[131] and in the open video systems rules in the 1996 *Telecommunications Act.*[132] While a network provider would be deemed a speaker when functioning in its proprietary role, its monopoly status might invoke sufficient governmental interest in providing public access to overcome the owner's First Amendment interest in asserting editorial control.[133] In a setting of near infinite capacity, this would not amount to restricting some voices in order to enhance others.[134]

Conclusion

If freedom of speech or expression is important in a democracy, then speakers must have access to places where people congregate so that the right may be exercised. Streets, sidewalks, parks, and other public places have in the past been readily available as public fora. In the twentieth century, socioeconomic changes have shifted the focus of community life from these traditional meeting places to privately owned fora such as shopping centers and corporate office complexes. As we enter the next century, the newest forum for congregation and debate is the new information environment -- a setting owned and controlled by the private sector.

Just as the privatization of public information resources jeopardizes the tangible and intangible assets of this nation's common resource pool, the privatization of public space represents a threat to social discourse in the public sphere. A vital public sphere requires that speakers are free to express ideas that are not necessarily compatible with the views of the owners of a given forum. If corporations are not to be permitted absolute free rein to set our social, cultural, and economic agenda, individuals must be free to express themselves freely and to exchange their ideas and opinions. The new information technologies offer this potential. Policy is needed to extend the opportunity to participate to everyone who wishes to -- not just those who can afford the fee or those who are willing to deliver an acceptable and profitable message. The need for policy to ensure system access to the new information commons is paramount as more of the information resources citizens need to participate in a democratic society are made available in digital format and distributed via privately owned networks. A participant in the new information commons cannot simply use public property to carry on a discussion, as the hapless leafleteers in Tanner were advised to do.

The Supreme Court has ruled that the rights of free speech and petition on privately owned property can be protected by individual state constitutions. The Court has also made clear that private property that performs a substantial public function nonetheless retains its private characteristics. In the conflict between speech rights and property rights, the doctrine of free expression on private property offers courts a means to balance the rights of property owners with the right to freedom of expression of individuals. As many observers have pointed out, however, when private property bears virtually all the characteristics and functions of public property, a vital public sphere depends on the balance being weighted in favor of freedom of expression.

Despite those who maintain the government should get out of the way and let the free market system develop the new information environment, government intervention is essential in any endeavor to ensure the widest possible access to the information environment.[135] Even a well-functioning market is subject to government controls;

obviously the government's role is circumscribed with regard to regulations on speech. The state may not, for example, restrict speech on the basis on content. But a requirement of universal access would not involve the government dictating a specific message. The responsibility is incumbent upon government to regulate the new information environment in a sufficiently neutral way, to ensure universal access to the new information and communications systems -- not only to promote a well-functioning democratic regime, but to ensure that the new communications capabilities succeed in empowering all segments of society to find, retrieve, create, and disseminate content in a variety of formats.

Notes

[1] See for example, William J. Clinton and Albert Gore, Jr., A Framework for Electronic Global Commerce, (1 July 1997) at http://www.iitf.nist.gov/eleccomm/ecomm.htm: "Though government played a role in financing the initial development of the Internet, its expansion has been driven primarily by the private sector. For electronic commerce to flourish, the private sector must continue to lead. Innovation, expanded services, broader participation, and lower prices will arise in a market-driven arena, not in an environment that operates as a regulated industry."

[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat 56 (1996) (hereafter Telecommunications Act).. See for example, Eben Moglen, "The Invisible Barbecue," Columbia Law Review 97 no. 4 (May 1997): 945; Monroe Price and John F. Duffy, "Technological Change and Doctrinal Persistence: Telecommunications Reform in Congress and the Court," Columbia Law Review 97 no. 4 (May 1997): 976).

[3] Price Waterhouse, EMC Technology Forecast: 1998. New York: Price Waterhouse World Firm Services BV, Inc. 1997, quoting Paul Goodstat, EMC Price Waterhouse Global MCS Co-Leader.

[4] See for example, David S. Hilzenrath, "Judge Rules AOL Can Block Direct-Marketing Firm's Ads," Washington Post (5 November 1996): C01. The decision (in U.S. District Court) permits America Online to block unsolicited electronic mail on its system. "The decision mean that AOL . . . can enforce restrictions on speech and behavior when users are communicating over its computer network."

[5] Lance Leibman, "Forward: The New Estates," Columbia Law Review 97 no. 4 (May 1997): 832.

[6] The question of whether or not everyone will have equal access has been described as "the civil rights issue of the twenty-first century." See Howard Bryant, "Will There be Redlining in Cyberspace? Black Enterprise 25 no. 12 (July 1995): 47, quoting Jeffrey Chester, executive director of the Center for Media Education, Washington D.C.

[7] Rick Szykowny, "The Threat of Public Access: An Interview with Chris Hill and Brian Springer," The Humanist, 54 no. 3 (May 1994): 16, quoting Chris Hill. See also Eric L. Richard, "The Jurisprudential Sin of Treating Differents Alike: Emergence of Full First Amendment Protection for Corporate Speakers," Memphis State University Law Review 17 (1987): 218-219 (discussing likelihood that the speech of individuals will be "reduced to insignificance" by corporations with the economic resources necessary to communicate in the political realm.)

[8] Reed Hundt, "The Internet: From Here to Ubiquity," Address before the Institute of Electrical and Electronics Engineers, The Symposium on Hot Chips, 26 August 1997: http://www.fcc.gov/Speeches/Hundt/spreh742.html. Chairman Hundt uses the term, 'computer persons' to describe these individuals.

[9] The ability to carry multimedia formats on a single broadband conduit is expected to spur the development of a host of interactive products and services. See for example Roger Levy, "A-T-M Spells Switching Success," America's Network, 15 November 1994, 68,70. Levy observes that while fiber optics and better digital transmission systems have

improved network quality, the asynchronous transfer mode (ATM) switching protocol is ideal for transmitting time-dependent information such as video and voice, and the broadband signals needed for multimedia program delivery. Levy suggests that while entertainment products such as movies and interactive games may be the initial offerings, this capacity will ultimately be used for advanced telecommuting.
As information packaging and delivery become more flexible, small entrepreneurs will find means to add value to their products and services by tailoring both format and content to suit groups of users and individual end-users. See Cynthia N. James Catalano, "Hit the Malls," Internet World, 7 no. 12 (December 1996): 34,36.

[10] For example, multimedia formats make new types of education possible. Students from elementary school through graduate school now take part in collaborate learning projects using electronic fora on the Internet, homepages on the World Wide Web, and video teleconferences. Eighth-graders in New Jersey talked with Zlata Filipovic, author of Zlata's Diary: A Child's Life in Sarajevo, through a real-time Internet relay chat. See Carol Holzberg, "Worldwide Encounters," Internet World, 7 no. 9 (September 1996): 81.

[11] Herbert I. Schiller, "Challenging the Global Cultural Factories," in Bill Horrigan and Jason Simon, eds., ROAR: The Paper Tiger Guide to Media Activism, (New York: Paper Tiger Television Collective, 1991): http://www.papertiger.org/roar/chap2.html

[12] Szykowny, 17 - 21, quoting Brian Springer.

[13] Norman Redlich and David R. Lurie, "First Amendment Issues Presented by the 'Information Superhighway,'" Seton Hall Law Review 25 (1995): 1448.

[14] Office of the Press Secretary, The White House, Background on Clinton-Gore Administration's Next-Generation Internet Initiative, (10 October 1996) at http://www.iitf.nist.gov/documents/press/internet.htm

[15] Andrew L. Shapiro, "Street Corners in Cyberspace: Free Public Forums Must be Preserved on the Internet," The Nation, 261 no. 1 (3 July 1995): 10.

[16] Cass Sunstein terms this the Madisonian tradition which he explains culminated in New York Times v. Sullivan, 376 U.S. 254 (1964), and the reaffirmation of the fairness doctrine in Red Lion Broadcasting v. FCC, 395 US 367 (1969). In Red Lion the Supreme Court suggested that the government's efforts to encourage diverse views and attention to public issues were compatible with the free speech principles --- even if they resulted in regulatory controls on the owners of speech sources. This tradition has also received sustained attention in the writings of Alexander Meiklejohn. Cass Sunstein, "First Amendment in Cyberspace," Yale Law Journal 104 (1995): 1762; .Moglen, 945; Price and Duffy, 976.

[17] Steven Helle, "Essay on the Bill of Rights: Whither the Public's Right (Not) to Know? Milton, Malls, and Multicultural Speech," University of Illinois Law Review (1991): 1086; Steven Miller, Civilizing Cyberspace: Policy, Power, and the Information Superhighway (New York: ACM Press,, 1996), 259; Allen S. Hammond, "Regulating Broadband Communication Networks," Yale Journal on Regulation 9 no. 1 (Winter 1992): 218; Note, "The Message in the Medium: The First Amendment on the Information Superhighway," Harvard Law Review 107 (1994): 1093; Redlich and Lurie, 1453.

[18] Redlich & Lurie, 1453.

[19] New communications technologies tend to be regulated (at least initially) like the existing technology they most closely resemble. See Ithiel de Sola Pool, Technologies of Freedom (Cambridge, MA: Harvard University Press, 1983), 231-248. Using the analogy approach, courts have distinguished telegraph and telephone, Chesapeake and Potomac Telephone Co. V. Baltimore and Ohio Telegraph Co. 66 Md.339 (1887), broadcasting and print, Red Lion Broadcasting v FCC 395 US 367, 388 (1969), cable television and broadcasting, Quincy Cable TV v FCC 768 F.2d 1434 (D.C. Cir. 1985), and broadcasting and common carriage, FCC v Midwest Video Corp. 440 U.S. 689, 702 (1979).

[20] Berger, 637. See also Craig Calhoun, ed., "Introduction," Habermas and the Public Sphere (Cambridge MA: MIT Press, 1992).

[21] Thomas I. Emerson, Toward a General Theory of the First Amendment, (New York: Random House, 1966), 9.

[22] In the classical, liberal free speech tradition, typified by the writings of John Milton, Thomas Jefferson, and John Stuart Mill, the First Amendment is regarded as a necessary check on government's ability to interfere with an individual's choice to speak or to receive whatever information he or she desires. Thus, the First Amendment has been described as an example of a "negative freedom" the "freedom from, not a freedom to." Threats to free speech might come from many sources, but historically government has represented the most potent threat to free expression. The concept of "negative freedom" is described by Isaiah Berlin, Two Concepts of Liberty (London: Oxford University Press, 1958), 7. For an explanation of its application to the First Amendment, see generally and Matthew D. Bunker and Charles N. Davis, "The First Amendment as a Sword: The Positive Liberty Doctrine and Cable Must-Carry Provisions," Journal of Broadcasting & Electronic Media, 40 (Winter 1996): 77-95. However, new information and communications technologies are forcing a significant reorientation involving the First Amendment. The classic liberal tradition is challenged, perhaps because it leaves us with a "blind spot" when applied to the new information environment: "The new media are changing both the movement of information and the meaning of information in our society. They do not promise to restrict communication, but they do threaten the communications environment that fostered the idea of a law to protect expression. We may, for example, have both more freedom, and a more explicit system of regulation. These are not necessarily contradictory or undesirable states of affairs, but they are also not wholly consistent with the way the First Amendment has been considered in the past." See M. Ethan Katsh, The Electronic Media and the Transformation of Law (New York: Oxford University Press, 1989), 118 (footnotes omitted).

[23] Szykowny, 22, quoting Chris Hill.

[24] Lloyd Corp. v. Tanner, 407 U.S. 551, 586 (1972) (Marshall dissenting).

[25] Michael Schudson, "Was There Ever a Public Sphere?" in Craig Calhoun, ed. Habermas and the Public Sphere, 146-147. Schudson emphasizes Jurgen Habermas' notion that it is not sufficient to simply vote in a democracy. A functioning public sphere requires its participants to also engage in critical discourse. Habermas characterized a public sphere as encompassing both widespread and *rational* participation.

[26] Schudson, 150-160. Schudson harbors no romantic illusions: "The politically oriented riot was a more familiar form of political activity than learned discussion of political principles."

[27] James Lemert, "News Context and the Elimination of Mobilizing Information: An Experiment," Journalism Quarterly (1984): 243-249, 259., quoted by Schudson, 152.

[28] David Nord, "Tocqueville, Garrison, and the Perfection of Journalism," Journalism History 13 (1986); 56-63, quoted by Schudson, 153.

[29] John Biewen, "Lawrence Tribe: Public forum and First Amendment Interview," Morning Edition, (Washington, D.C., National Public Radio, 14 July 1997).

[30] Witold Rybcynski, "The New Downtowns: Shopping Malls," The Atlantic, 271 no. 5 (May 1993): 98; James Podgers, "Free Speech in the New Downtowns," American Bar Association Journal 81 (April 1995): 54.

[31] See below footnotes 43-93.

[32] Podgers, 54.

[33] Although the actual term "public forum" was not used by the Supreme Court until 1961 in International Association of Machinists v. Street, 367 U.S. 740, the evolution of the notion of a public place being opened to the public for speech purposes began in 1897 with Davis v. Massachusetts, 167 U.S. 43 (1897). The Court unanimously decided that a city was under no obligation to makes its areas available for use, unless it chose to do so. In Lovell v. City of Griffin, 303 U.S. 444 (1938), the Court seemingly reversed its opinion by striking down an ordinance that would require government permission before permitting expressions. By 1939, in Hague v. CIO, 307 U.S. 496, 515 (1939) the Supreme Court choose to protect speech in public places, pointing out that free expression requires protection of the means of distribution, as well as the protection of publication. See also, Dom Caristi, Expanding Free Expression in the Marketplace: Broadcasting and the Public Forum, (New York: Quorum Books, 1992), 30-32 and 65-66, and Hammond, "Regulating Broadband Communication Networks," 235. While a public forum (e.g., a sidewalk, public streets, or a park) is one historically associated with free speech. a quasi-public forum is one created for purposes other than free expression but which has a close relationship to expressive activity (e.g., libraries Concerned Women for America v. Lafayette County, 883 F. 2d 32 (5th Cir. 1989).and schools (Lamb's Chapel v. Center Moriches Union Free School District, 113 S. Ct. 2141 (1993)). A private forum is one where speech can be restricted. A public forum can also be created when private property is intentionally opened for public discourse. See also Warren Freedman, Freedom of Speech on Private Property, (New York: Quorum Books, 1988), 37.

[34] Carl Berger cautions that the slow pace of judicial change might make common-law solutions to problems of access less appropriate than regulatory efforts to extend the public forum doctrine, undertaken at the state level. But while legislation within each state allows for "custom-tailoring," it also risks perpetuating the unwieldy regulatory environment that currently characterizes common carrier regulation in the U.S. See Berger, 671.

[35] Price and Duffy, 996, footnote 79, citing Lawrence Lessig, on the importance of identifying the values of "pre-existing" doctrine for use in the context of cyberspace.

[36] Denver Area Educational Telecommunications Consortium Inc. v. FCC, 116 S. Ct. 2374, 2384 (1996).

[37] Roger A. Lohman, The Commons: New Perspectives on Nonprofit Organizations and Voluntary Action, (San Francisco: Jossey-Bass Publishers, 1992), 62.

[38] See for example, Howard Rheingold, The Virtual Community: Homesteading on the Electronic Frontier, (Reading, MA: Addison-Wesley, 1993), 39-64.

[39] Numerous, diverse and varied fora exist on-line. See for example, Austin Texas' Fiber City, a public forum designed to provide information about the municipality's telecommunications infrastructure at http://www.88net.net/fibercity/; Vancouver B.C.'s Spectacular State: Fascism and the Modern Imagination, a public forum which brings together artists, activists, and scholars to generate critical discussion about the various characteristics and consequences of fascism in its historical and contemporary contexts at http://hoshi.cic.sfu.ca/~spec-state/; Alamouna, an Arab Webzine dedicated to providing a forum for intellectual and uncensored thought at http://leb.net/alamouna/; the Boston Women's Web, a networking forum designed to facilitate communication between women living in the Boston area and the nonprofit organizations that serve them at http://www.bostonwomen.com/; Alaska Forum for Environmental Responsibility, dedicated to holding industry and government accountable to the laws designed to safeguard Alaska's environment, worker safety, and public health at http://www.accessone.com/~afersea/; Voices of Youth, a site from UNICEF that includes pictures, writings, discussion groups and interactive resources to provide a forum for youth and educators around the world to explore global issues such as children's rights, urbanization, war and on-line learning at http://www.unicef.org/voy/; the Solidarity Network, (SoliNet) a resource and meeting place for unionists and supporters of the labor movement. Among the sections available here are international labor news, documents in the library, and several interactive discussion forums at http://www.solinet.org/; Solart an on-line gallery designed to give artists who have difficulty getting showings in traditional galleries a forum for exposure and feedback. All artists have world exposure for their work, the opportunity to sell their pieces, and there is no cost to the artist at http://www.solart.com/; Religions and Spirituality Forum, a place to share and explore subjects related to the world's religious and spiritual traditions at http://www.talkcity.com/religions/; Queer Arts Resources a nonprofit Internet-based forum for the display and discussion of lesbian and gay content in the visual arts at http://www.queer-arts.org/; National Network for Immigrant and Refugee Rights (NNIRR), a national organization composed of local coalitions and immigrant, refugee, community, religious, civil rights and labor organizations and activists that serves as a forum to share information and analysis, to educate communities and the general public, and to develop and coordinate plans of action on important immigrant and refugee issues at http://www.nnirr.org/; Military Women, a forum for women in the military to share their experiences of military life. Links to areas such as "What's it like where you're stationed?" and live conferences at http://www.Militarywoman.org/.

[40] Ason Chervokas and Tom Watson, "New-Media Pamphleteers Revisit The Roots of the First Amendment, New York Times on the Web: Cybertimes: Digital Nation (10 October 1997): at http://www.nytimes.com/library/cyber/nation/101097nation.html. "All over the Web there are 'news' sites springing up, some national but many local in nature. These sites provide local gadflies, government critics and people sympathetic to their causes an alternative outlet. Taken together, they paint a picture of a previously marginalized community of Americans. While some take an adversarial stance to the mainstream press, others aim to tell stories that are merely overlooked -- *often community news of an extremely local nature.*" (emphasis added).

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[41] See for example, the National Gallery of Art at http://www.nga.gov/; Web Museum at http://sunsite.unc.edu/wm/; Callahan's Saloon at http://www.delphi.com/callahan/; Virtual-Valley, Western Massachusetts' On-line Community at http://virtual-valley.com/; Virtual Sidney/Shelby County, Ohio at http://www.erinet.com/sidney/; the Virtual Center Of The Sephardic Community at http://www.bsz.org/; the Virtual Community of Associations of greater Washington D.C. at http://www.vcanet.org/vca/abtvca.htm; Virtual Jerusalem at http://www.virtual.co.il/; Virtual Fest, a self-described virtual community consisting of "a merry band of crafters, musicians, storyspinners, artisans, wordsmiths, and magicians," at http://www.VirtualFest.com/; Virtual Film Festival at http://www.virtualfilm.com/; College Station, Texas, at http://www.cstx.gov/; Live World, featuring "Talk City," a site for interactive chat at http://www.liveworld.com/; Elder Web, an on-line community of older adult computer users, at http://www.elderweb.org/; Phoenix Tea House, the "virtual Asian American community," at http://www.phoenixteahouse.com/; Virtual Commons, cyber café production specialists at http://vcommons.com/; West Ed's Technology in Education, K-12 distance education examples at http://www.fwl.org/edtech/k12de.html; Cyber High School, a private, college preparatory high school serving students worldwide. Instruction takes place over the Internet, using a curriculum specifically designed for students who are motivated to work independently toward entrance to college, at http://www.webcom.com/~cyberhi/welcome.html.

[42] Calhoun, "Introduction," 4.

[43] Michael Meyerson suggests that while the high level of government involvement in funding telecommunications network research and with the interconnected characteristics of most privately owned and publicly financed networks could invoke state action, the state action doctrine is "labyrinth of competing policies and analyses." Myerson quotes Laurence Tribe: 'Viewed doctrinally, state action cases are a conceptual disaster area.'" Meyerson, 135.

[44] Rybczynsky, 101.

[45] Miller, 226

[46] Freedman, 3.

[47] Hague v. CIO, 307 U.S. 496 515 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.")

[48] International Society of Krishna Consciousness v. Lee, 505 U.S. 672 (1992) (A 5-4 decision finding that an airport terminal is a nonpublic forum.)

[49] Pruneyard Shopping Center v. Robins, 447 U.S. 74, 100 S. Ct. 2035 (1980).

[50] For an ironic example of privatization of the Supreme Court's own materials, see Carl S. Kaplan, "Company Limits Net Access to Supreme Court Rulings," New York Times on the Web: Cybertimes: Cyber Law Journal: (17 July 1997) at http://www.nytimes.com/library/cyber/law/071797law.html. In a paradoxical footnote to the Communications Decency Act decision which declared the Internet represented a "new marketplace of idea," Alderson Reporting Co. Inc., the company that has an exclusive contract to tape-record Supreme Court oral arguments and prepare and sell official transcripts, has decided to restrict buyers of the transcripts from posting them on the Web.

[51] See for example, Michael I. Meyerson, "Virtual Constitutions: The Creation of Rules for Governing Private Networks," Harvard Journal of Law & Technology, 8 no. 1 (Fall 1994): 138; Comment, "The Message in the Medium: The First Amendment on the Information Superhighway," Harvard Law Review 107 (1994): 1093; Miller, 243-244; Helle, 1093; Redlich & Lurie, 1453; Shapiro, 10; Rybcynski, 98.

[52] 326 U.S. 501 (1946)

[53] Marsh v. Alabama, 326 U.S. 501, 503, 508 (1946).

[54] Prior to Marsh, the Court had stated that the government could not absolutely ban free speech activity on public streets or sidewalks. Hague v. CIO, 307 US 496 (1939). In Marsh, however, the streets, sidewalks and everything else in the town was privately owned.

[55] Marsh v. Alabama, 326 U.S. 501, 507-508 (1946).

[56] Some activities have been held by the Court to be inherently public, and therefore state action, regardless of who performed them. See for example, Evans v. Newton, 382 US 296 (1966) where the character of a privately owned park makes it subject to the Fourteenth Amendment prohibition against racial segregation.

[57] Marsh v. Alabama, 326 U.S. 501, 509 (1946).

[58] Id., 506

[59] Id., 508-509, quoted by Michael Meyerson, "Virtual Constitutions: The Creation of Rules for Governing Private Networks," Harvard Journal of Law & Technology 8 no. 1 (Fall 1994). The large number of citizens living at that time in company towns and the preferred position of speech (see U.S. v. Carolene Products Co, 304 US 144 (1938) at 152-153) made it imperative that the First Amendment rights be fully guaranteed.

[60] Food Employees Union V. Logan Valley Plaza, Inc., 391 U.S. 308, 317 (1968).

[61] Id., 315.

[62] Id., 318-319.

[63] Id., 319.

[64] Id., 320, footnote 9.

[65] Id., 322. This conclusion is curious, because to deny a person the right to speak in one place because they can speak freely elsewhere seems to beg the question of free speech. In Schneider v. State 308 US 147, 163 (1939) the Supreme Court held "one is not to have the exercise of his liberty of expression in appropriate places abridge on the plea that it may be exercised in some other place." Quoted by Justice Marshall in Logan Valley.

[66] Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

[67] Id., 568-569.

[68] The Tanner Court reasoned that the company town in Marsh had possessed all the characteristics of a municipality. In Logan Valley the holding was not dependent on a shopping center being the functional equivalent of a municipality. Lloyd Corp. v. Tanner, 563.

[69] Id., 565.

[70] Id., 564-565.

[71] Id., 571.

[72] Id., 581-582.

[73] Id., 580.

[74] Id., 580-581.

[75] 424 US 507 (1976).

[76] Hudgens v. National Labor Relations Board 424 US 507, 513 (1976).

[77] For a discussion of the access cases as examples of classical liberal and neoliberal decisions, see Helle, 1092-1093.

[78] Justice Stewart stated: "If a large self-contained shopping center *is* the functional equivalent of a municipality, as Logan Valley held, then the First and Fourteenth Amendments would not permit control of speech within such a center to depend upon the speech's content." Hudgens v. National Labor Relations Board 424 US 507, 520 (1976).

[79] However as Steven Helle points out, this represents a superficial reading of state action. The Court in Marsh v. Alabama 326 U.S. 501, 507 (1946), for example, had noted that the state is not passive if the rights of property owners are given priority over the alleged rights of speakers desiring access. Helle also points out the inconsistency of this decision vis a vis the 1968 Logan Valley decision.

[80] Hudgens v. National Labor Relations Board 424 US 507, 539 - 540 (1976).

[81] Hudgens v. National Labor Relations Board 424 US 507, 542 - 543 (1976), quoting Munn v. Illinois 94 U.S. 113, 126 (1877).

[82] 447 U.S. 74 (1980).

[83] California Constitution, art. I, sec. 2: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

[84] Pruneyard Shopping Center v. Robins 447 U.S. 74, 87 (1980).

[85] Robins v. Pruneyard Shopping Center 592 P. 2d 341 (1979).

[86] Id., 347.

[87] Id., 347-348.

[88] Id., 347-348.

[89] James W. McCauley, "Comment: Transforming the Privately Owned Shopping Center into a Public Forum: *Pruneyard Shopping Center v. Robins*," University of Richmond Law Review 15 (1981): 715.

[90] Pruneyard Shopping Center v. Robins 447 US 74, 83 (1980).

[91] Id., 87.

[92] Id., 82.

[93] Id., 83.

[94] Id., 84-85, (quoting Nebbia v New York, 291 US 502, 523 (1934)).

[95] Wooley v. Maynard 430 US 705 (1977) (The 'live free or die' motto on vehicle license plates can be covered up.)

[96] Miami Herald v. Tornillo 428 US 241 (1974) (State cannot tell a newspaper what to print.)

[97] Pruneyard Shopping Center v. Robins 447 U.S. 74, 87 (1980).

[98] There would be no constitutional difficulty if one state imposed more rigorous regulation on property rights than another state, as long as the supremacy of federal law is recognized, and the state interpretation does not impinge on a countervailing federal right. Freedman, 39.

[99] Besides California, supporters of free speech have prevailed in Massachusetts: Batchelder v. Allied Stores International 445 NE 2d 590 (Mass., 1983); New Jersey :New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp., 650 A. 2d 757 (N.J. 1994); Washington Alwood Associates v. Washington Environment Council 635 P 2d 108 (Wash. 1981); Oregon: State v. Cargill 786 P. 2d 208 (Ore. 1990); and Colorado: Bock v. Westminster Mall Co. 891 p. 2d 55 (Colo. 1991). Private property supporters have prevailed in Arizona: Fiesta Mall Venture v. Mecham Recall Committee 767 P. 2d 719 (1988); Connecticut: Cologne v. Westfarms Associates 469 A. 2d 1201 (Conn. 1984); Michigan: Woodland v. Michigan Citizens Lobby 378 N.W. 2 d 337 (Mich. 1985); New York: SHAD Alliance v. Smith Haven Mall 488 N.E. 2 d 1211 (N.Y. 1985); North Carolina: State v. Felmet 273 S.E 2d 708 (N.C. 1981); Pennsylvania: W. Penn. Socialist Workers 1982 Campaign v. Connecticut General Life Insurance Co. 515 A. 2d 1331 (Penn. 1986); Wisconsin: Jacobs v. Majors 407 N.W. 2 d 832 (Wis. 1987); and Illinois: People v. DiGuida 604 N.E. 2d 336 (Ill. 1992).
But see Lance S. Davidson, "Guidelines for Free-Speech Activity at Shopping Centers," Practical Real Estate Lawyer (September 1989): 42-43. "Probably one half of the nation's large shopping malls (guardedly) permit access for defined noncommercial purposes but under strict controls."

[100] See for example, "Demonstrators Have Right to Protest, Leaflet in New Jersey Shopping Mall," News Media and the Law, 19 no. 1 (winter 1995); Boorstin, 269-273; Berger, 656; Podgers 54; Rbyczynski, 101.

[101] Even Schudson, with his iconoclast perspective on history, takes pains not to discount the importance of a public sphere in a democratic society. Schudson, 160.

[102] "A lot of people don't understand how really limited is the range of information they're currently getting from television. They might think they're getting all the different angles on any particular topic, but that's just a misconception they have from watching so much television." Szykowny, 22, quoting Chris Hill.

[103] Helle, 1090, Shapiro, 10; Szykowny, 20-21, quoting Chris Hill. Rybczynski, 101 points out that the owners of shopping malls are usually large corporations, not individuals.

[104] Munn v. Illinois 94 U.S. 113, 126 (1877). See also Freedman, 38.

[105] Shapiro, 10.

[106] Berger 661.

[107] For a discussion of cyberspace and location, see David R. Johnson, "Traveling in Cyberspace," Legal Times, (3 April 1995): 26. See also Comment, "The Message in the Medium: The First Amendment on the Information Superhighway," Harvard Law Review

107 (1994): 1087 for a discussion of discourse and privacy. "The balance between speakers' rights and listeners' privacy depends largely on the forum in which the speech takes place. The Pacifica Court (FCC v. Pacifica Foundation, 438 U.S. 726, 765) pictured broadcasting as an activity that occurs inside the homes . . . however the dissent in Pacific noted that, 'because the radio is undeniable a public medium [turning on the radio is] more properly viewed as a decision to take part, if only as a listener, in an ongoing public discourse.' Thus, unlike the majority, the dissent accepted that public discourse can take place outside a physical public space." (footnotes omitted).

[108] See generally, Joshua Meyrowitz, No Sense of Place: The Impact of Electronic Media on Social Behavior, (New York: Oxford University Press, 1985).

[109] "The Message in the Medium: The First Amendment on the Information Superhighway," 1087; See also Barry Forbes, "Oxymoron of 'Free' Speech," From the Town Meeting to the World Wide Web: Creating and Maintaining Democracy in the Telecommunications Age (31 August 1997) at http://www.alliancecm.org/acmtaa.htm: "The days of strolling down to a town meeting for a spirited debate on public issues is long past. Today, we get soundbites on entertainment television, thirty-second commercials on complex issues, call-in talk show harangues, flashy commercial web pages, and flaming e-mail attachments. In the near future, media and telecommunications will continue to converge."

[110] Access to the new information environment alone, of course, is not the whole answer. The need for policy to address questions of universal service, access to government information, access to information on health care, employment and education is perhaps even more critical in light of the new deregulatory language of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). The issue of universal service is one example of an area that will require new policy guidelines in a competitive marketplace. See for example, Kevin Taglang, "Public Interest Advocates, Universal Service and the Telecommunications Act of 1996," published on-line by the Benton Foundation, (February 1996), at http://www.benton.org/Library/Advocates/advocates.html
See also Barry Forbes, at http://www.alliancecm.org/acmtaa.htm: "Those who believe that open public discourse continues to be the basis of the American democracy face a dilemma: how to advance the theory and practice of 'free speech' from the town meeting of the past to the commercially-driven and technologically-advanced telecommunications networks of the present? In order to make this cultural leap, three basic problems must be solved:
Access: People must be connected to whatever forum provides open public discourse. However, this connection must provide symmetrical interaction -- allow people to participate in a dialogue rather than be passive recipients of information and entertainment.
Economics: A cost-free stroll to the public street corner or public library has been replaced by buying expensive electronic equipment and telecommunications services. Although inexpensive to some people, the cost of participating in the new electronic marketplace of ideas is prohibitive to most people.
Knowledge: People need to know how to use the equipment and telecommunications service, as well as to understand how to get the most benefit from the 'electronic street corner.'"

[111] Helle, 1092.

[112] See above, footnotes 31 and 32.

[113] Jared Sandberg, "How One Company is Quietly Buying up the Internet," Wall Street Journal 99 September 9, 1997): B1.

[114] Szykowny, 18, quoting Chris Hill.

[115] Libraries for the Future: "Library Advocates Guide to Telecommunications – Update" (23 July 1997) at http://www.lff.org/technology/update.html.

[116] "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish." Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969); FCC v. League of Women Voters, 468 U.S. 364, 377 (1984): "The fundamental distinguishing characteristic of the new medium of broadcasting . . . is that broadcast frequencies are a scarce resource [that] must be portioned out among applicants."

[117] "Even in communities with two or more cable systems, in the typical case each system has a local monopoly over its subscribers . . . Cable operators thus exercise 'control over most (if not all) of the television programming that is channeled into the subscriber's home. . . . [and] can thus silence the voice of competing speakers with a mere flick of the switch.'" Turner Broadcasting System Inc. v. FCC 117 S.Ct. 1174, 1190 (1997), quoting Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 656 (1994).

[118] See for example, Quincy Cable v. FCC 768 F.2d 1434 (1985); Century Communications v. FCC 835 F 2d. 292 (1987); Turner Broadcasting System, Inc. v. FCC 819 F. Supp 32 (1993); Turner Broadcasting System, Inc. v. FCC, 114 S. Ct. 2445 (1994); Turner Broadcasting System Inc. v. FCC 117 S.Ct. 1174 (1997).

[119] The Benton Foundation and other public interest advocacy groups are concerned about how the 1996 Telecommunications Act will treat access requirements: "While operators of 'open video systems' officially would have to make channels available to competing video programmers and local government and educational institutions, they effectively could escape this obligation by charging rates that these groups would find prohibitively high, according to Barry Forbes, executive director of the Alliance for Community Media. The law merely requires that operators of open video systems charge all programmers rates that are 'not unjustly or unreasonably discriminatory,' but says nothing about rates that are excessive." Benton Foundation, "Seeking Open Video Platforms," The Telecom Environment: What's at Stake (undated) at http://www.benton.org/Library/Stake/telecom/platforms.html

[120] Turner Broadcasting System Inc. v. FCC 114 S.Ct. 2445, 2466 (1994): "Appellants urge us to apply strict scrutiny because the must carry provisions favor one set of speakers (broadcast programmers) over another (cable programmers). Appellants maintain that as a consequence of this speaker preference, some cable programmers who would have secured carriage in the absence of must carry may now be dropped."

[121] Although viewpoint scarcity could, in theory, be eliminated, this alone does not guarantee a vibrant public discourse. As Cass Sunstein points out, even in a universe with infinite communications capacity, it will be easy to ignore the issues no one chooses to discuss. See Cass Sunstein, Democracy and the Problem of Free Speech (New York: The Free Press, 1995): 68-69.

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[122] "The Message in the Medium: The First Amendment on the Information Superhighway," 1089.

[123] The network owner could also post notices -- on-line and elsewhere -- to make it clear that it did not necessarily share the opinions or ideas that its network carried. See for example Turner Broadcasting System Inc. v. FCC 114 S. Ct. 2445, 2466 (1994): "Broadcasters are required by federal regulation to identify themselves at least once every hour, and it is a common practice for broadcasters to disclaim any identity of viewpoint between the management and the speakers who use the broadcast facility. (Citing Pruneyard Shopping Center v. Robins, 447 U.S. 74, 87 (1980),noting that the views expressed by speakers who are granted a right of access to a shopping center would "not likely be identified with those of the owner.").

The threat of negative consumer reaction has also been suggested as a reason for owners to deny access, particularly (as is the case with large media conglomerates) if the network owner has interests in other businesses that might be adversely affected by consumer boycotts. See "The Message in the Medium: The First Amendment on the Information Superhighway," 1089.

[124] "The Message in the Medium: The First Amendment on the Information Superhighway," 1092.

[125] Shapiro, 10. Shapiro lumps together "terminally wired hackers . . . cyberwonks at the Electronic Frontier Foundation . . .Newt Gingrich, Al Gore and other Third Wave lawmakers," as those who would present the situation as such a false choice.

[126] Shapiro, 11.

[127] Hammond, "Regulating Broadband Communication Networks," 219.

[128] Allen Hammond, "Private Networks, Public Speech: Constitutional Speech Dimensions of Access to Private Networks," University of Pittsburgh Law Review 55 (1994): 1132.

[129] Hammond, "Regulating Broadband Communication Networks," 218 - 223. A public forum, much like a common carrier, would not be liable for the content of the speech carried on its facilities. If private fora interconnect with the public fora networks, they would be required to make some of their transmission capacity available to other interconnected firms and users on the public networks. Note also that while broadcast and cable television could treated as quasi public fora, because they are accessible to speakers on only a limited basis, Hammond suggests that the print media would be private fora, because print media need never be open to the public.

[130] Redlich and Lurie, 1454.

[131] "Congress may also be able to act in more mandatory ways. If Congress finds that cable operators are leaving some channels empty-perhaps for ease of future expansion-it can compel the operators to make the free channels available to programmers who otherwise would not get carriage. See PruneYard Shopping Center v. Robins, 447 U.S. 74, 88 (1980) (upholding a compelled access scheme because it did not burden others' speech). Congress might also conceivably obligate cable operators to act as common carriers for some of their channels, with those channels being open to all through some sort of lottery system or timesharing arrangement. Setting aside any possible Takings Clause issues, it stands to reason that if Congress may demand that telephone companies operate as

common carriers, it can ask the same of cable companies; such an approach would not suffer from the defect of preferring one speaker to another." Turner Broadcasting Sys. v. FCC, 114 S. Ct. 2445, 2480 (1994), Justice O'Connor concurring in part, dissenting in part.

[132] Telecommunications Act Title III, Cable Services, Section 302, Cable Service Provided by Telephone Companies, Part V, Video Programming Services Provider by Telephone Companies, Sec. 653, "Establishment of Open Video Systems."

[133] Redlich and Lurie, 1454.

[134] "The Message in the Medium: The First Amendment on the Information Superhighway," 1092.

[135] See for example, Sunstein, "First Amendment in Cyberspace," 1762. Government may try promote to attention to public issues. It may try to ensure a diversity of views. It may promote political speech at the expense of other forms of speech, in particular educational and public-affairs programming, which in the Madisonian view, have a special place in this tradition.

The Journalist's Privilege for Nonconfidential Information in States with Shield Laws

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The Journalist's Privilege[1] for Nonconfidential Information in States with Shield Laws

I. Introduction

For at least 150 years, journalists who have been subpoenaed to testify in court or before legislative or executive bodies have resisted.[2] Journalists cited their individual codes of honor or journalistic norms to justify their resistance to official efforts to force them to reveal confidential sources.[3] It was not until 1958 that a journalist claiming a First Amendment right to protect a confidential source took a case to an appellate court.[4] The U.S. Supreme Court refused in 1972 to recognize a First

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[1] The privilege not to testify about confidential or non-confidential information has been called in the literature the newsman's privilege, the newsperson's privilege, the reporter's privilege and the journalist's privilege. This paper uses the term journalist's privilege because of its non-sexist nature and because the word "journalist" is more inclusive of news professionals such as photographers and camera operators who are not reporters.

[2] Aaron David Gordon, Protection of News Sources: The History and Legal Status of the Newsman's Privilege (1971) (unpublished dissertation, University of Wisconsin, 2 vols.).

[3] *Id.* at 184-287.

[4] Garland v. Torre, 259 F.2d 545 (2d. Circ. 1958), *cert denied*, 79 S.Ct. 237 (1958). Judge Potter Stewart, who later the same year would be named to the U.S. Supreme Court, wrote the opinion that rejected New York newspaper columnist Marie Torre's claim that she should not be forced to testify about the identity of her source for an allegedly defamatory comment about actress Judy Garland. Torre claimed that forcing journalists to reveal their sources would discourage sources from talking to journalists, impeding the flow of information to the press and hence the public. Judge Stewart, while not ruling out the applicability of a journalist's privilege in other situations, wrote that Torre's testimony "went to the heart" of Garland's case against a television network and ordered Torre to reveal the source. *Id.*

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Amendment-based journalist's privilege for confidential sources in the only case in which it has ruled on the issue, but that decision applied only to grand juries and trials.[5]

More recently, scholars and journalists have raised the issue of a privilege for nonconfidential information[6] with increasing regularity. The increase in attention can be attributed to the realization that subpoenas for nonconfidential information are far more common than subpoenas seeking the identity of confidential sources. Three national surveys conducted by the Reporters Committee for Freedom of the Press found that only 5.1 percent of the subpoenas received by news organizations in 1989, 3.4 percent in 1991, and 3.8 percent in 1993 asked journalists to reveal confidential sources or information.[7] A study in Florida found that less than three percent of the total number of subpoenas served on journalists during a forty-two-month period were for confidential sources.[8]

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[5] Branzburg v. Hayes, 408 U.S. 665 (1972). *See* notes 22-36 *infra* and accompanying text.

[6] At the risk of stating a tautology, "nonconfidential information" for the purpose of this paper is defined as any information gathered by a journalist outside of a relationship with a source in which confidentiality was promised. The definition includes journalists' notes, observations, audio recordings, video outtakes, unpublished photographs, and other unpublished material, as well as published photographs and stories. The definition is based in part on a composite of state shield statute definitions and court cases interpreting those statutes. *See* Parts III and IV *infra*. The definition includes what is sometimes referred to as journalists' "work product." *See*, e.g., Laurence B. Alexander, Protection Without a Shield: Revisiting the Journalist's Common Law Privilege (1997) (unpublished paper presented at the national convention of the Association for Education in Journalism and Mass Communication, Chicago). Traditionally, according to one researcher, requests for published material were not considered controversial and usually were handled informally, with the news organization supplying the material in exchange for a promise that no journalist would be called to testify. *See* Donna Rosene Leff, Journalists and Jurists: The Evolution of Reporter's Privilege After "Branzburg" 32-65 (1982) (unpublished doctoral dissertation, University of California-Berkeley). However, testimony about published material has been at the heart of some recent controversies over the journalist's privilege. *See* Dollar v. State, 21 Fla. L. Weekly D2583 (1996) (conviction of man accused of soliciting for sex with a minor reversed because trial judge quashed subpoena for reporter who wrote newspaper story used as evidence by the prosecution; newspaper articles are not "self-proving"). *See also* the cases cited in notes 13-15 *infra*.

The Florida study also found that after a state Supreme Court decision[9] in 1990 that narrowed the common-law privilege in that state, the total number of subpoenas served on journalists increased 70.8 percent in the twenty-one months compared to the twenty-one months before the ruling.[10] The Reporters Committee studies also found that the number of subpoenas of all kinds served on journalists and their employers have been increasing in recent years. In 1991, 43.9 percent of the news organizations answering the survey reported receiving subpoenas, but in 1993 the percentage rose to 52.1.[11]

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[7] Reporters Committee for Freedom of the Press, Agents of Discovery: A Report on the Incidence of Subpoenas Served on the News Media in 1989 12 (1991); at 13 (1993); at 10 (1995). Hereinafter referred to as Reporters Committee 1991, 1993, and 1995.

[8] Laurence B. Alexander, Linda M. Perry & Bill F. Chamberlin, Branzburg v. Hayes Revisited: A Survey of Journalists Who Become Subpoena Targets, 15 Newspaper Res. J. 97 (Spring 1994).

[9] Miami Herald v. Morejon, 561 So.2d 577 (Fla. 1990).

[10] Alexander, Perry & Chamberlin, *supra* note 8, at 83.

[11] Reporters Committee 1993, *supra* note 7, at 6; Reporters Committee 1995, *supra* note 7, at 3.

Not only does the number of subpoenas appear to be increasing, but at least one journalism organization suggests that the press is losing ground in battling the subpoenas. The Society of Professional Journalists (SPJ) issued a report in 1997 warning that the journalist's privilege was in trouble nationwide.[12] The report's evidence for its conclusion included cases in Florida,[13] Minnesota,[14] and Texas[15] in which courts had interpreted the statutory or common-law privilege narrowly. All of the cases involved nonconfidential information. Media law experts quoted in the SPJ report attributed the slippage in the privilege to public dissatisfaction with sensational reporting and a lack of understanding about the need for the privilege.[16]

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[12] Holli Hartman, The Erosion of the Reporter's Privilege, SPJ Reports (1997).

[13] Kidwell v. State, 696 So.2d 399 (Fla.App. 1997) (no privilege, qualified or otherwise, exists at common law allowing reporter to refuse to testify in court about nonconfidential interview with murder suspect); Davis v. State, 692 S.2d 924 (1997), *rev. granted*, 700 So.2d 687 (Fla. 1997) (conviction vacated for man convicted of aggravated assault because trial judge quashed defense subpoena for reporter who interviewed victim). The Florida Legislature approved a shield law in 1998, however, and Gov. Lawton Chiles signed it in May of that year. *See* SB 150, creating FLA. STAT. § 90.5015, on the Florida Legislature's Web site at http://www.leg.state.fl.us/.

[14] State v. Turner, 550 N.W.2d 622 (1996) (shield law does not apply to nonconfidential information and photographer's testimony about an arrest he observed).

[15] State ex rel. Healey v. McMeans, 884 S.W.2d 772 (Tex.Cr.App. 1994) (state recognizes no journalist's privilege allowing reporters to withhold evidence in a criminal case); Coleman v. State, 1997 Tx. Crim. App. LEXIS 25 (1997) (reporters who wrote stories about gang activities six weeks after a gang-related slaying could not refuse to testify at trial).

[16] Hartman, *supra* note 12, at 9 (hereafter SPJ Report).

The SPJ report's suggestion that the journalist's privilege for nonconfidential information is eroding leaves open the question of the extent to which the privilege has been recognized. To date, little study has been devoted to the question of whether nonconfidential information should be or has been privileged and to what extent.[17] One logical place to start such an examination of the issue is to look at states with shield laws to determine what those laws say about nonconfidential information.

This paper will examine briefly in Part II court recognition of confidential and nonconfidential information privileges and the reasons courts have ruled for or against recognizing the privileges. Part III will examine the state shield laws to determine which ones protect nonconfidential information either explicitly or implicitly. Part IV will look at how appellate courts in the states with shield laws have interpreted the protection for nonconfidential information. Part V will analyze the language of the shield laws and the court decisions to determine the extent of the protection for journalists' nonconfidential information.

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[17] Exceptions include ALEXANDER, *supra* note 6, and LAURENCE B. ALEXANDER and LEAH G. COOPER, WORDS THAT SHIELD: A TEXTUAL ANALYSIS OF THE JOURNALIST'S PRIVILEGE, 18 NEWSPAPER RES. J. 51 (Winter/Spring 1997). Both studies discuss protections at common law and in shield laws for nonconfidential information to some extent as part of more general discussions of the journalist's privilege.

II. Rationales for a Journalist's Privilege

Judicial protection for nonconfidential information is a relatively new phenomenon and is an outgrowth of protection for confidential sources. Courts have been far from unanimous in agreeing that the First Amendment requires that journalists be immunized from forced disclosure of any information, however.

The Ninth Circuit U.S. Court of Appeals in 1970 became the first federal appellate court to recognize a First Amendment privilege in a case involving a grand jury investigation. In *Caldwell v. United States,*[18] a *New York Times* reporter who covered the Black Panthers in California argued that even his appearance before a federal grand jury would jeopardize his sensitive working relationship with the militant group. The court agreed and ruled that the government needed to show a "compelling need" for Earl Caldwell's evidence.[19]

The government appealed the *Caldwell* case and the U.S. Supreme Court granted *certiorari.*[20] In *Branzburg v. Hayes,*[21] the Court consolidated the Caldwell case with three others in which journalists had invoked a common law or shield law privilege but lost.[22] Justice Byron White's majority opinion rejected the reporters' First Amendment claims. While conceding that news gathering deserved some First Amendment protection,[23] White wrote that the First Amendment did not invalidate any "incidental burdening" of the press caused by the enforcement of laws that apply to all citizens.[24] Courts, White wrote, consistently had found that the public "has a right to every man's evidence" except in those instances when a constitutional, common-law, or statutory privilege had been accorded to a possible witness.[25]

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[18] 434 F.2d 1081 (9th Circ. 1970).

[19] *Id.* at 1089.

[20] 402 U.S. 942 (1971).

[21] 408 U.S. 665 (1972).

[22] Branzburg v. Hayes, 408 U.S. 665 (1972). In Branzburg v. Pound, 461 S.W.2d 345 (Ky. 1971), and Branzburg v. Meigs, 503 S.W.2d 748 (Ky. 1971), the Kentucky Court of Appeals held that

White rejected the Ninth Circuit's assertion in the Caldwell case that the government should be required to show a "compelling need" for a reporter's information before requiring him or her to testify. White wrote that the Court was unwilling to "embark the

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Kentucky's shield law granting a privilege to journalists to refuse to disclose confidential sources or information did not apply to a journalist who had witnessed criminal activity. Paul Branzburg, a reporter for the Louisville *Courier-Journal*, was called to appear before two grand juries after he wrote stories about the activities of hashish makers and drug users. The name of the case was changed to Branzburg v. Hayes after Judge Pound of Jefferson County, Ky., left the bench and was replaced by Judge Hayes. In the other case consolidated with Branzburg and Caldwell, a Massachusetts television reporter was subpoenaed to testify before a grand jury after he spent three hours in a New Bedford Black Panthers headquarters after a night of rioting. The Black Panthers agreed to allow Paul Pappas into the headquarters on the condition he reveal nothing he saw except for an anticipated police raid. The raid did not occur while Pappas was there and he filed no story. The Supreme Judicial Court of Massachusetts held that there was no constitutional privilege, qualified or otherwise, allowing a journalist to refuse to appear and testify before a grand jury. *See* In re Pappas, 266 N.E.2d 297, 302-303 (1971).

[23] Branzburg v. Hayes, 408 U.S. 665, 681 (1972).

[24] *Id.* at 682-683.

[25] *Id.* at 686-688, *citing* United States v. Bryan, 339 U.S. 323 (1950).

judiciary on a long and difficult journey" to an uncertain destination.[26] A constitutional privilege would force the courts to go through lengthy preliminary procedures to determine whether a "compelling need" existed. He also wrote that the recognition of a First Amendment privilege would eventually embroil the courts in determining who was a "journalist" entitled to the privilege.[27]

In a concurring opinion, Justice Lewis Powell noted the "limited nature" of the holding. Powell said that journalists who suspected they were called to testify for the purpose of harassment or otherwise in bad faith "will have access to the court" to quash a subpoena. Each such claim, Powell added, should be judged on a case-by-case basis, with the claim to a privilege balanced against the obligation of all citizens to testify about criminal activities.[28]

Justice Potter Stewart, joined by Justices William Brennan and Thurgood Marshall, wrote a dissent that argued that the decision would lead state and federal authorities to "annex the journalistic profession as an investigative arm of the government."[29] Stewart wrote that the right of journalists to protect confidential sources was rooted in the societal interest in "a full and free flow of information to the public."[30] A free flow of information was essential to a free society based on the idea of self-government, Stewart wrote, and an independent press was essential to providing a "robust variety of information and opinion" to society and "encouraging diversity of expression."[31]

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[26] *Id.* at 703.

[27] *Id.* at 705.

[28] *Id.* at 709-710.

[29] *Id.* at 725.

Stewart conceded that society had an interest in the use of grand juries to ensure the fair and effective administration of justice. He argued that the grand jury's power to require "every man's evidence" was not absolute and could be curtailed by privileges granted to protect "a very real interest," such as the First Amendment.[32] Stewart then set out a test that could be used to determine if a journalist should be required to testify before a grand jury and reveal confidences. The government would have to show, Stewart wrote:

> (1) ... that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) ... that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) ... a compelling and overriding interest in the information.[33]

In a separate dissent, Justice William O. Douglas argued that the journalist's privilege should be absolute.[34] He

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[30] *Id.*

[31] *Id.* at 725-727.

[32] *Id.* at 737.

[33] *Id.* at 743.

[34] *Id.* at 711-712.

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explicitly rejected the idea of a balancing test in privilege cases, arguing that "all of the 'balancing' was done by those who wrote the Bill of Rights" when they phrased the First Amendment in "absolute terms."[35] Douglas said the press was given a "preferred position" in the Constitution to aid in the public's "right to know," a necessary corollary to the governing power of the people.[36]

Because of the divided nature of the *Branzburg* opinion, lower federal courts and state courts reacted to it in a number of ways. Three federal appellate courts recognized a qualified privilege, along the lines suggested by Justice Stewart in *Branzburg*,[37] in civil cases and in a grand jury case.[38] The courts distinguished the cases from *Branzburg* by noting Powell's concurrence limiting *Branzburg* to grand jury proceedings in which a journalist was alleged to have witnessed a crime or was told about criminal activity.

A federal district court in Florida became the first to extend the reasoning favoring a journalist's privilege to nonconfidential information in 1975. In *Loadholtz v. Fields*,[39] the judge rejected a motion to compel discovery after a newspaper reporter refused to answer questions in regard to a civil suit. The plaintiff in the suit demanded reporter Arnold "Butch" Prevatt's testimony and documents related to an interview with the defendant that resulted in a published story. Prevatt resisted even though the interview was "on the record" and no confidential sources were implicated.[40]

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[35] *Id.* at 713.

[36] *Id.* at 721.

[37] *See supra* notes 32-33 and accompanying text.

[38] Bursey v. United States, 466 F.2d 1059 (9th Circ. 1972), *reh'g denied*, 466 F.2d 1090 (9th Circ. 1972); Cervantes v. Time Inc., 464 F.2d 986 (8th Circ. 1972), *cert. denied*, 409 U.S. 1125 (1973); Baker v. F&F Investment Co., 470 F.2d 778 (2nd Circ. 1972), *cert. denied*, 411 U.S. 966 (1973).

[39] 389 F. Supp. 1299 (M.D. Fla. 1975).

In rejecting the discovery motion, the court noted the nonconfidential nature of the material sought but said there was no difference between compelling the disclosure of confidential or nonconfidential material. The distinction was "utterly irrelevant" to the "chilling effect" that enforcing the subpoenas in the case would have on the press and the flow of information to the public, the judge wrote.[41] "The compelled production of a reporter's resource materials," the court said, "is equally as invidious as the compelled disclosure of his confidential informants."[42]

One practice guide on testimonial privileges notes that since *Loadholtz*, there has been a general trend in federal and state courts to extend the journalist's privilege to nonconfidential, unpublished information.[43] The guide noted that courts have recognized a First Amendment privilege for nonconfidential information for a variety of reasons, mostly involving a perceived need to protect the "institutional autonomy" of the press from government intrusion.[44] Journalists also have argued, as Justice Stewart did in *Branzburg*,[45] that forcing journalists to testify would cause them to be perceived in the public's mind as investigators for the government. Such a perception, journalists say, would damage their ability to gather news by making sources apprehensive that what they tell a reporter today will be used against them in court tomorrow.[46]

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[40] *Id.*, at 1300.

[41] *Id.* at 1303.

[42] *Id.*

[43] JOHN W. ZUCKER, THE JOURNALIST'S PRIVILEGE, § 8-10, *in* SCOTT N. STONE & ROBERT K. TAYLOR, 2 TESTIMONIAL PRIVILEGES (1995, Supp. 1997).

The nonconfidential information privilege has not been as widely recognized as the privilege for confidential sources, however. One reason is that a number of courts, even those that have recognized a qualified privilege for confidential sources, have balked at extending the privilege further. The courts that have rejected a privilege for nonconfidential information have found that the "chilling effect" is limited to disclosing confidences and do not agree with journalists' contentions that the forced disclosure of nonconfidential information has the same effect on sources.[47]

Extending the journalist's privilege to nonconfidential information also is limited by courts' suspicion of evidentiary and testimonial privileges in general. Dean John Henry Wigmore's respected treatise on evidence shows a general disdain for most privileges as impediments to the search for truth. The treatise quotes favorably from an American Bar Association report in the 1930s that called the tendency to recognize "novel" privileges, including one for journalists, "unwholesome." The ABA report recommended that legislators reduce the number of privileges rather than create new ones.[48]

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[44] *Id.*

[45] *See supra* note 29 and accompanying text.

[46] Zucker, *supra* note 43.

[47] *Id.*

Wigmore's four criteria for a privilege rely heavily on the presumption that the communications in question are confidential and that confidentiality is essential to the relationship between the parties in question.[49] This understanding of the prerequisites for recognizing a privilege would seem to disfavor a nonconfidential information privilege for journalists. Similarly, if one accepts the *Branzburg* Court's view that a journalist is a citizen like any other, he or she is still subject to the grand jury's need for "every man's evidence"[50]

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[48] 8 Wigmore, Evidence § 2286 (McNaughton rev. 1961). The treatise lists four conditions for recognizing a privilege, all of which should be met before a privilege is recognized: "(1) The communications must originate in a *confidence* that they will not be disclosed. (2) This element of *confidentiality must be essential* to the full and satisfactory relationship between the parties. (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*. (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation." *Id.*, § 2285 (emphasis in original).

[49] *Id.*

[50] *See supra* note 25 and accompanying text.

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whether the evidence was obtained from a confidential or nonconfidential source.

III. Statutory Protection in Shield Law States

The *Branzburg* decision created more confusion than clarity about the existence of a journalist's privilege, but it did not invalidate the shield laws in effect in eighteen states at the time the decision was handed down.[51] In fact, the majority stated that the Supreme Court could not stop states from recognizing a privilege, either in their common law or by statute.[52] In the twenty-six years since *Branzburg*, twelve more states and the District of Columbia have enacted shield laws.[53]

The recognition of a journalist's privilege for nonconfidential information varies widely from state to state. Eighteen states and the District of Columbia protect nonconfidential information either explicitly, by using the word "nonconfidential," or by implication, by not limiting the privilege to confidential sources or information, in statutes or state constitutions.[54] Twelve states provide no protection in their statutes for nonconfidential information.[55]

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[51] The Branzburg decision refers to seventeen shield laws, in Alabama, Alaska, Arizona, Arkansas, California, Indiana, Kentucky, Louisiana, Maryland, Michigan, Montana, Nevada, New Jersey, New Mexico, New York, Ohio, and Pennsylvania. Branzburg v. Hayes, 408 U.S. 665, 689 (1972). However, Rhode Island enacted a shield law in 1971. *See* GEN. LAW OF R.I. § 9-19.1-1, History of Section (Michie 1985 and 1996 Supp.).

[52] Branzburg v. Hayes, 408 U.S. 665, 706 (1972).

[53] The twelve states are Colorado, Delaware, Florida, Georgia, Illinois, Minnesota, Nebraska, North Dakota, Oklahoma, Oregon, South Carolina, and Tennessee.

The statutes recognizing the journalist's privilege for nonconfidential information have common characteristics, although they differ in specificity. The statutes generally define who can claim the privilege and what media are covered in which proceedings. The shield laws also differentiate between published and unpublished information in many cases, with published information generally not covered. In states where the privilege is explicitly qualified,[56] the statutes specify how the presumption of a privilege can be overcome. Particularly important for discussions of a privilege for nonconfidential information is how each state defines what types of information are covered.

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[54] The eighteen states are California, Colorado, Delaware, Florida, Georgia, Louisiana, Maryland, Minnesota, Montana, Nebraska, Nevada, New Jersey, New York, North Dakota, Oklahoma, Oregon, South Carolina, and Tennessee. Minnesota is included in this list because of a 1998 amendment to its shield law, but whether its newly rewritten statute applies to nonconfidential information may depend on judicial interpretation. The amendment extends qualified shield law protection to "unpublished information," including notes, tapes, and film, "whether or not it would tend to identify the person or means through which the information was obtained." However, a section of the shield law stating its "public purpose" was left unchanged, and that section stated that the purpose of the Free Flow of Information Act was to "insure and perpetuate ... the *confidential relationship* between the news media and its sources." MINN. STAT. ANN. § 595.022 (West 1988, Supp. 1997) (emphasis added). For a transcript of the Minnesota Legislature's changes to §§ 595.023 and 595.024, *see* LEGISLATURE RESTORES REPORTER SHIELD LAW, 5 FARsight 1 (Summer 1998). FARsight is a newsletter published by the Minnesota Joint Media Committee.

[55] The twelve states are Alabama, Alaska, Arizona, Arkansas, Illinois, Indiana, Kentucky, Michigan, New Mexico, Ohio, Pennsylvania, and Rhode Island.

[56] Some statutes appear on their face to provide absolute privileges, meaning that the privilege is not subject to exceptions. Other states "qualify" the privilege by stating what the government must prove to overcome the presumption that the information it seeks is privileged.

A. How the States Define Nonconfidential Information

Only two states explicitly use the words "nonconfidential information" in their shield statutes. Louisiana provides a qualified privilege for unpublished or nonbroadcast news or the source of such news, "even if such news was not obtained or received in confidence."[57] The statute defines "news" as "any written, oral, pictorial, photographic, electronic, or other information or communication ... concerning local, national, or worldwide events or other matters of public concern or public interest or affecting the public welfare."[58] New York also protects journalists from being forced to disclose nonconfidential news, and its privilege also is qualified. New York also requires that the nonconfidential news be unpublished.[59] New York defines news in almost identical language to Louisiana.[60]

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[57] LA. REV. STAT. § 45:1459 (B)(1) (West 1982 as amended, Supp. 1997).

[58] *Id.*, (A).

[59] N.Y. CIV. RTS. LAW § 79-h (c) (West 1992, Supp. 1997).

[60] *Id.*, (a)(8) ("'News' shall mean written, oral, pictorial, photographic, or electronically recorded information or communication concerning local, national or worldwide events or other matters of public concern or public interest or affecting the public welfare").

Among states that do not specifically use the words "nonconfidential information" in their statutes, Colorado has one of the broadest definitions of what is covered. It defines news information as "any knowledge, observation, notes, documents, photographs, films, recordings, videotapes, audiotapes, and reports, and the contents and sources thereof." The definition applies to information "regardless of whether such items have been provided or obtained ... in confidence."[61] However, in Colorado the privilege does not apply to any information gathered at a news conference; published or broadcast; based on a journalist's personal observation of the commission of a crime if the information cannot reasonably be obtained elsewhere; or based on a newsperson's personal observation of the commission of certain felonies.[62]

Some of the other states that provide privileges for nonconfidential information define in fairly explicit terms what material is covered under the privilege. California is the only state to provide a journalist's privilege in its state constitution. Almost identical language is contained in the California Evidence Code. Both the Constitution and the Evidence Code provide that no journalist for a print or broadcast medium can be held in contempt by any legislative, judicial or administrative body for refusing to disclose the source of any information or any unpublished information. The Constitution and

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[61] COLO. REV. STAT. ANN. § 13-90-119 (1)(b) (West 1997).

[62] *Id.*, (2)(a), (b), (c), and (d).

Evidence Code define unpublished information as notes, outtakes, photographs, tapes, or other data not disseminated to the public, even if information based on such material was published.[63] Similar language is contained in statutes in Delaware,[64] the District of Columbia[65], and Maryland.[66]

Other states, such as New Jersey, define "news" as "any written, oral or pictorial information"[67] or use similar terms.[68] Montana,[69] North Dakota,[70] and Tennessee[71] refer only to "any information," while Georgia[72] and South Carolina[73] refer to "any information, document or item." Nevada refers to "any published or unpublished information."[74] Florida does not define

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[63] CAL. CONST. art. I, § 2 (LEXIS 1997); CAL. EVID. CODE Sect. 1070 (LEXIS 1996).

[64] DEL. CODE ANN. § 4320 (2) (Michie 1975, Supp. 1997).

[65] D.C. CODE ANN. § 16-4702 (A), (B), (C), (D), (E), and (F) (LEXIS 1997).

[66] MD. ANN. CODE § 9-112 (2)(i), (ii), (iii), (iv), (v), and (vi) (Michie 1995).

[67] N.J. STAT. ANN. § 2A:84A-21a (b) (1994).

[68] *See* ORE. REV. STAT. § 44.510 (1) (1995); OKLA. STAT. ANN. § 2506 (A)(3) (West 1993); NEB. REV. STAT. § 20-145 (3) (1991, Supp. 1996).

[69] MONT. CODE ANN. § 26-1-902 (1) (1995, Supp. 1996).

[70] N.D. CENT. CODE § 31-01-06.2 (LEXIS 1997).

[71] TENN. CODE ANN. § 24-1-208 (a) (Michie 1980, Supp. 1997).

[72] GA. CODE ANN. § 24-9-30 (Michie 1995, Supp. 1997).

[73] S.C. CODE § 19-11-100 (A) (Lawyers Coop. Supp. 1996).

[74] NEV. REV. STAT. ANN. § 49.275 (Michie 1996).

"information" and defines "news" as information "of public concern, relating to local, statewide, national, or worldwide issues or events."[75]

B. Defining Who is Protected

In *Branzburg*, Justice White warned that recognition of a journalist's privilege inevitably would lead to courts having to determine who is a "journalist."[76] Many of the states that protect journalists from testifying about or turning over nonconfidential information define who is protected in specific terms. Some states apparently have left it up to the courts to decide when the term "journalist" or its equivalent applies.

States that are specific include Nebraska, Oklahoma and Oregon, which say that the privilege may be claimed by a person employed by, connected with, or engaged in a "medium of communication." The states define "medium of communications" as "any newspaper, magazine, other periodical, book, pamphlet, news service, wire service, news or feature syndicate, broadcast station or network, or cable television system."[77] Maryland specifically includes newspapers, magazines, journals, press associations, news agencies, wire services, radio, television, and "any printed, photographic, mechanical, or electronic means of disseminating news and information to the public."[78] Other states, such as Colorado, define the media more narrowly. Colorado defines "mass medium" as "any publisher of a newspaper or periodical; wire service; radio or television station or network; news or feature syndicate; or cable television system."[79]

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[75] Fla. Stat. § 90.5015 (1)(c), as passed by the Florida Legislature in 1998 as SB 150. *See supra* note 13.

[76] 408 U.S. 665, 705 (1972). *See supra* note 27 and accompanying text.

[77] OKLA. STAT. ANN. Title 12, § 2506 (1993); ORE. REV. STAT. § 44.510 (1995); NEB. REV. STAT. § 20-145 (1991, Supp. 1996).

Those states that define the media in more vague or general terms refer simply to protections for persons employed by or connected with "the news media;"[80] "any organization engaged in publishing or broadcasting news;"[81] or "the news media or press."[82]

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[78] MD. ANN. CODE § 9-112 (Michie 1995). *See also* N.J. STAT. ANN. § 2A:84A-21a (1994) ("newspapers, magazines, press associations, news agencies, wire services, radio, television or other similar printed, photographic, mechanical or electronic means of disseminating news to the general public"); S.C. CODE § 19-11-100 (Lawyers Coop. Pub. 1996 Supp.) ("newspaper, book, magazine, television, news or wire service, or other medium").

[79] COLO. REV. STAT. ANN. § 13-90-119 (1997). *See also* N.Y. CIV. RTS. LAW § 79-h (1992, Supp. 1997), which defines the media protected as newspapers, magazines, news agencies, press associations, wire services and defines each term. The statute also applies to "newscasters" employed by radio and television stations. *See also* LA. REV. STAT. § 1451 (West 1982, Supp. 1997) ("Any newspaper or other periodical issued at regular intervals and having a paid general circulation; press associations; wire service; radio; television; and persons or corporations engaged in the making of news reels or other motion picture news for public showing"); CAL. CONST. art. I, § 2 (LEXIS 1997) and CAL. EVID. CODE § 1070 (LEXIS 1996) (newspapers, magazines, press associations, and radio and television stations); FLA. STAT. § 90.5015, as contained in SB 150 (1998) ("newspaper, news journal, news agency, press association, wire service, radio or television station, network, or news magazine"); MONT. CODE ANN. § 26-1-902 (1995, Supp. 1996) ("any newspaper, magazine, press association, news agency, news service, radio station, television station or community antenna television service"); NEV. REV. STAT. ANN. § 49.275 (Michie 1996) ("any newspaper, periodical or press association or ... any radio or television station").

[80] D.C. CODE § 16-4702 (LEXIS 1997).

C. Defining the Scope of the Privilege

Most of the states provide a qualified privilege for nonconfidential information, and most define in fairly specific terms how the privilege can be overcome by someone seeking information. Many of the qualifications appear to be modeled after Justice Stewart's dissenting opinion in *Branzburg*, in which he provided a three-part balancing test requiring a showing of compelling need, relevance, and the lack of alternative sources.[83] However, California, Montana, Nebraska, Nevada, Oregon and the District of Columbia have provided what appears to be absolute protection to both confidential and nonconfidential information by not mentioning any qualifications in their statutes.[84]

Eleven states use a variation of the Stewart test. Delaware provides an absolute privilege in nonadjudicative proceedings, which it does not define, but qualifies the privilege for adjudicative proceedings. Adjudicative proceedings are defined as

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[81] N.D. CENT. CODE § 31-01-06.2 (LEXIS Michie 1997).

[82] TENN. CODE ANN. § 24-1-208 (Michie 1980, Supp. 1997).

[83] Branzburg v. Hayes, 408 U.S. 665, 743 (1972) (Stewart, J., dissenting). *See supra* note 33 and accompanying text.

[84] *See* CAL. CONST. art. I, § 2 (LEXIS 1997) and CAL. EVID. CODE § 1070 (LEXIS 1996); MONT. CODE ANN. § 26-1-902 (1995, Supp. 1996); NEB. REV. STAT. § 20-145 (1991, Supp. 1996); NEV. REV. STAT. ANN. § 49.275 (Michie 1996); ORE. REV. STAT. § 44.510 (1995).

"any judicial or quasi-judicial proceeding in which the rights of parties are determined," excluding grand juries.[85] In an adjudicative proceeding, the privilege can be overcome with respect to nonconfidential information if a judge determines that the public interest would be better served by having the journalist testify. In making the determination, the judge must apply the Stewart three-part test and consider the circumstances under which the journalist obtained the information and what effect disclosure could have on the future "flow of information to the public."[86]

Two states do not spell out the requirements for overcoming the privilege in much detail. North Dakota requires a court to find only that withholding the information would cause "a miscarriage of justice."[87] Louisiana requires that a court find that the disclosure is "essential to the public interest."[88]

IV. How the Courts Interpret the Statutes

Few appellate courts have interpreted the journalist's privilege for nonconfidential information in the states with shield laws. Those cases that have been decided have tried to clarify whether seemingly absolute privileges are truly absolute for nonconfidential information; what information is covered by the privilege in states in which the statutory definition is not clear; and what parties seeking journalists' testimony or information must do to overcome the privilege.

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[85] DEL. CODE ANN. § 4320 (1) (Michie 1975, Supp. 1997). Although Delaware does not define "nonadjudicative proceedings," its definition for adjudicative proceedings indicates that the term "nonadjudicative" refers to a proceeding of any executive or legislative body that has the power to subpoena witnesses or hold uncooperative witnesses in contempt.

[86] *Id.* Other states that use a variation of the Stewart test are Colorado, Florida, Georgia, Maryland, Minnesota, New Jersey, New York, Oklahoma, South Carolina, and Tennessee.

[87] N.D. CENT. CODE § 31-01-06.2 (LEXIS Michie 1997).

[88] LA. REV. STAT. § 45:1453 (West 1982, Supp. 1997).

A. Is an Absolute Privilege Truly Absolute?

Only one court has decided the issue of whether a seemingly absolute privilege is indeed absolute. In *Delaney v. Superior Court*,[89] the California Supreme Court determined that the seemingly absolute privilege had to be balanced against a criminal defendant's Sixth Amendment right to a fair trial. Two journalists, *Los Angeles Times* reporter Roxana Kopetman and photographer Roberto Santiago Bertero, accompanied a police task force in Long Beach for a story about the task force. The reporters observed the police officers arrest Sean Patrick Delaney on a misdemeanor charge of possessing brass knuckles after the officers searched his jacket. Delaney claimed he did not consent to the search and police had no reason to suspect he was armed. For a suppression hearing, Delaney subpoenaed Kopetman and Bertero, who refused to testify, citing the state's privilege for "unpublished information."[90]

The Supreme Court concluded that the shield law's protection is overcome in a criminal proceeding if nondisclosure would deprive the defendant of a fair trial.[91] The criminal defendant had to show that there was a "reasonable possibility" that the information could assist his defense, the court ruled,[92] and then satisfy a balancing test. The test should include whether unpublished information was confidential or sensitive, the interests sought to be protected by the shield law, the importance of the information to the defendant, and whether alternative sources were available.[93] The court determined that Delaney's interests won out in the balancing test because Kopetman and Bertero were the only objective witnesses to the search and arrest. The court ordered the trial court to deny the journalists' petition to be exempted from testifying.[94]

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[89] 789 P.2d 934 (Cal. 1990).

[90] *Id.* at 937.

But in another 1990 case, the California Supreme Court found that the journalist's privilege was absolute in a civil action. In *New York Times Co. v. Superior Court*,[95] decided after *Delaney*, the court could find no reason to force a newspaper photographer to turn over unpublished photos of an accident scene to one of the litigants in a personal-injury suit. The court distinguished *New York Times* from *Delaney* by saying there was no federal constitutional right that had to be balanced against the state shield law in this case.[96] However, in a footnote, the court stated that it did not mean to say that a constitutional issue could not come up in a later civil case.[97]

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[91] *Id.* at 946.

[92] *Id.*, at 948.

[93] *Id.*, at 949-951.

[94] *Id.*, at 954.

[95] 796 P.2d 811 (Cal. 1990).

B. What Types of Information are Covered?

Although the California Supreme Court ruled that the *Los Angeles Times* reporter and photographer would have to testify in the criminal case at issue in *Delaney*, the court also held that the journalist's privilege applied to nonconfidential, unpublished observations of an event in a public place.[98] The court held that Kopetman and Bertero could invoke the privilege for their observations of the search of Delaney's jacket. Using a dictionary definition of "information" that included "knowledge obtained from reading, *observation*, or instruction,"[99] the court said that under Article I, Section 2 of the California Constitution, all information was protected, not just confidential information.[100]

Colorado's shield law specifically includes a journalist's "observations" in its definition of news protected by the privilege.[101] The state Supreme Court held that a helicopter pilot for a television station could not be subpoenaed to testify about his observations while flying police officers over a suspected marijuana grower's property. In *Henderson v. People*,[102] the court said that under Colorado's definition of information, the pilot's observations and knowledge could not be compelled unless the defendant in the criminal trial could show that the information was unavailable elsewhere.[103] In this case, the court noted, the defendant and an officer on the helicopter were able to testify about the helicopter's altitude, which was a crucial issue in determining whether the flight over Henderson's property constituted an illegal search.[104]

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[96] *Id.*, at 815.

[97] *Id.*, note 11.

[98] 789 P.2d 934 (Cal. 1990). *See supra* notes 89-94 and accompanying text.

[99] WEBSTER'S NEW INTERNAT. DICT. 1276 (2d ed. 1958), *cited in Id.* at 942 (emphasis in text of decision).

[100] Delaney v. Superior Court, 789 P.2d 934, 942 (Cal. 1990).

[101] *See supra* note 61 and accompanying text.

The Tennessee Supreme Court was called upon to determine what its statute meant when it referred to information. In *Austin v. Memphis Publishing Co.*,[105] the court found that Tennessee's shield statute, which stated that no newsperson would be required to disclose "any information or the source of any information,"[106] clearly applied to nonconfidential information. The plaintiffs in a wrongful-death suit over a Memphis bridge collapse had subpoenaed the two Memphis newspapers, asking for all materials they possessed related to articles about the bridge accident.[107] The court found the statute's wording unambiguous and said that "any (information) means all," regardless of confidentiality.[108]

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[102] 879 P.2d 383 (Colo. 1994).

[103] *Id.*, at 393.

[104] *Id.*

[105] 655 S.W.2d 146 (Tenn. 1983).

[106] TENN. CODE ANN. § 24-1-208 (1973), as cited in *Id.* at 147. *See also supra* note 71 and accompanying text.

New Jersey's shield law specifically states that a journalist who is an eyewitness to an act involving physical violence or property damage may not invoke the shield.[109] However, the New Jersey Supreme Court determined that photographers who took aerial photos of a fire were not "eyewitnesses to an act" and did not have to turn over the photos. In *Matter of Woodhaven Lumber and Mill Work*,[110] the court said the eyewitness exception in the shield law did not apply to photographing the blaze, even if the journalists had the only aerial photos of the fire.[111] The eyewitness exception only would have applied if the photographers shot photos of a person setting the fire or of a person "running from a burning building with a can of kerosene and a lighted match in hand" -- in other words, actual criminal activity.[112]

C. How May the Privilege be Overcome?

The journalist's privilege statutes often qualify the privilege by using a variation of the Stewart three-part test from *Branzburg v. Hayes.*[113] In the majority opinion in *Branzburg*, Justice White wrote that recognizing a qualified privilege would entangle the trial courts in trying to determine whether the state had shown a "compelling need" for the information before a journalist could be forced to testify.[114] Several of the state court decisions have dealt with the issue of whether the state or another party had to prove it had a compelling need for nonconfidential information before a subpoena could be enforced.

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[107] Austin v. Memphis Publishing Co., 655 S.W.2d 146 (Tenn. 1983), at 147.

[108] *Id.*, at 149.

[109] N.J. STAT. ANN. § 2A:84A-21a (h) (West 1994).

[110] 589 A.2d 135 (N.J. 1991).

[111] *Id.*, at 141-142.

[112] *Id.*, at 139.

A Tennessee appellate court ruled in 1990 that the state had not met its burden to show that it had a compelling need for the outtakes of an interview with a murder suspect. In *Tennessee v. Shaffer*,[115] the Tennessee Court of Appeals denied the state outtakes of the two-hour interview with a man who confessed to killing two women. The man, James Shaffer, already had confessed to police officers before doing so in an interview with a television reporter.[116] The appeals court said the trial judge could not order an *in camera* review of the outtakes to determine relevancy and to attempt to find "clear and convincing evidence" that the privilege should be waived. The party seeking the information first had to prove that the privilege should be overcome before the journalist gave the outtakes to the court or the party, the appeals court said.[117]

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[113] *See supra* note 33 and accompanying text.

[114] Branzburg v. Hayes, 408 U.S. 665, 701-706 (1972). *See supra* note 27 and accompanying text.

[115] 17 Med. L. Rptr. 1489 (1990).

[116] *Id.*, at 1490.

Similarly, in Oregon, a three-judge panel of the Court of Appeals said defendants in a criminal case would have to do more than assert a possibility that newspaper photographs would help their case. In *State Ex. Rel. Meyers v. Howell*,[118] the defendants sought photos from a political demonstration that led to their arrests on misdemeanor charges. When *The Oregonian* in Portland refused to provide the photos, the trial judge ordered the paper held in contempt, fined it $300, and ordered that the executive editor be jailed until the paper provided the photos.[119] The jail sentence was stayed pending appeal, however, and before the case went to the appeals court, the criminal defendants dropped their request for the photos. The Court of Appeals decided that the issue was still ripe for discussion, but it failed to reach the constitutional issue of whether the shield law conflicted with the state constitution's Compulsory Process Clause, which required that criminal defendants have the right to compel witnesses in their favor to appear in court.[120] The court held that the process clause only applied if the material sought was material and favorable to the defense, and that the defendants had not crossed that initial threshold of proof.[121]

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[117] *Id.*, at 1494.

[118] 740 P.2d 792 (Or.App. 1987).

[119] *Id.*, at 793-794.

[120] ORE. CONST. art. I, § 11, *cited in Id.* at 795.

The North Dakota Supreme Court ruled that a party in a civil suit did not have to meet all the prongs of the Stewart three-part test before being allowed to subpoena unpublished photos. North Dakota's shield statute says that if a trial court finds that the failure to disclose the journalist's evidence would result in a miscarriage of justice, the court can order the journalist to disclose his or her information or a source of information.[122] In *Grand Forks Herald v. District Court*,[123] the North Dakota Supreme Court held that a photographer who shot photos of the aftermath of a motorcycle-automobile collision should be required to turn over unpublished photos of the accident scene.[124] The decision rested heavily on the fact that the major point of contention between the litigants was the point of impact in the collision. The court said the point of impact could be better determined by photographs than eyewitness accounts, so the litigant had a compelling need for the photos. The court said it was irrelevant whether the attorney sought other sources of information.[125]

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[121] *Id.*, at 797.

[122] N.D. CENT. CODE § 31-10-06.2 (LEXIS 1997). *See supra* note 89 and accompanying text.

[123] 322 N.W.2d 850 (1982).

[124] *Id.*, at 857.

[125] *Id.*, at 856.

V. Analysis and Conclusion

By the time the U.S. Supreme Court decided that the First Amendment did not give journalists the right to claim a privilege against testifying about confidential sources in grand jury or court proceedings,[126] eighteen states had passed shield laws.[127] In the intervening twenty-six years, twelve more states and the District of Columbia have added shield statutes.[128] Eighteen states and the District of Columbia have provided some protection for journalists' nonconfidential information in statutes.[129]

The protection for nonconfidential information is not uniform in the states that recognize a nonconfidential privilege. Five states and the District of Columbia appear to provide an absolute privilege for both nonconfidential and confidential information in their statutes. However, the California Supreme Court has ruled that the state's constitutional and statutory privilege is not absolute in criminal cases,[130] although it may be in civil cases.[131]

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[126] Branzburg v. Hayes, 408 U.S. 665 (1972). *See supra* notes 22-36 and accompanying text.

[127] *See supra* note 51.

[128] *See supra* note 53.

[129] *See supra* note 54.

[130] Delaney v. Superior Court, 789 P.2d 934 (Cal. 1990). *See supra* notes 89-94 and accompanying text.

[131] New York Times Co. v. Superior Court, 796 P.2d 811 (Cal. 1990). *See supra* notes 95-97 and accompanying text.

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Most of the states that recognize a journalist's privilege by statute qualify the privilege. Someone seeking nonconfidential information must pass some version of the Stewart three-part test from *Branzburg*.[132] The use of the three-part test is surprising given that the test was part of the dissenting opinion in *Branzburg*. The acceptance of the test shows that the press has been able to convince legislators that the Stewart test is the best way to balance the competing interests of the justice system's need for evidence and journalists' need to protect themselves from being "annexed" as investigators for the government or litigators. However, North Dakota only requires that the trial court determine that a journalist's nondisclosure of information would result in a "miscarriage of justice."[133] The North Dakota Supreme Court's only decision to date about the journalist's privilege for nonconfidential information used a variation of the Stewart test. However, the court found that the party seeking a newspaper's unpublished photographs only had to satisfy one prong of the test to be successful.[134]

Most statutes that protect nonconfidential information apply only to unpublished information. Some statutes have limited the definition of unpublished information to include only information in tangible forms, such as notes and photographs. However, in

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[132] *See supra* note 33 and accompanying text.

[133] *See supra* note 87 and accompanying text.

[134] Grand Forks Herald v. District Court, 322 N.W.2d 850 (N.D. 1982). *See supra* notes 123-125 and accompanying text.

Colorado, which specifically protects journalists' "observations,"[135] testimony presumably would be limited only to what was actually written or broadcast, not other things the journalist noticed but did not include in a story. Colorado's Supreme Court apparently read that state's statute that way when it allowed a television journalist to avoid testifying about his observations during a helicopter flight over a marijuana grower's farm.[136] In California, the state Supreme Court ruled that observations were part of the definition of "information" in that state's constitution and statute.[137] In New Jersey, which specifically exempts a journalist's eyewitness observation of a crime from its privilege, the Supreme Court has defined "eyewitness" narrowly to apply only to the actual witnessing of the commission of a crime, not its aftermath.[138]

The case law, limited as it is, suggests that specificity is helpful but not essential in protecting the journalist's privilege for nonconfidential information. As the Tennessee Supreme Court case shows, a lack of specificity about what kinds of information are privileged can work in the media's favor. In that case, the court found that "any" information meant "all" information.[139] However, in North Dakota, a lack of specificity about the proof that a party seeking information had to provide to overcome the presumed privilege allowed the court to narrowly tailor the test in a civil suit. The result was that once the subpoenaing party showed a compelling need, the inquiry ended.[140]

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[135] *See supra* note 61 and accompanying text.

[136] Henderson v. People, 879 P.2d 383 (Colo. 1994). *See supra* notes 102-104 and accompanying text.

[137] Delaney v. Superior Court, 789 P.2d 934 (Cal. 1990). *See supra* note 98-100 and accompanying text.

[138] In the Matter of Woodhaven Lumber, 589 A.2d 135 (N.J. 1991). *See supra* notes 110-112 and accompanying text.

While this study found that eighteen state shield laws appear on their face to protect nonconfidential information, it should be noted that most of those shield laws have not been tested at the appellate level. It is not a foregone conclusion that all of the state appellate courts will read their statutes as broadly as California, Colorado, New Jersey, and Tennessee have. Much may depend on the legislative intent of drafters of the shield laws and on each court's interpretation of the laws.[141]

This study did not find any overwhelming support for the Society of Professional Journalists' assertion that the journalist's privilege was eroding, at least in states with shield laws. It also should be noted that since the SPJ report was issued, Minnesota has amended its shield law and Florida has approved one that could improve the situation for journalists in both states. However, in the case of the privilege for nonconfidential information, the fact that about one-third of the states appear to provide some level of statutory protection for journalists does not indicate widespread support. In states without shield laws, more evidence has accumulated since the SPJ report that courts are hesitant to recognize a nonconfidential information privilege. North Carolina courts twice rejected a common-law privilege for nonconfidential information in early 1998.[142] Also, the Fifth Circuit U.S. Court of Appeals refused to recognize a nonconfidential privilege after a television station was ordered to turn over outtakes of a nonconfidential interview with an arson suspect.[143]

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[139] Austin v. Memphis Publishing Co., 655 S.W.2d 146 (Tenn. 1983), *supra* notes 105-108.

[140] Grand Forks Herald v. District Court, 322 N.W.2d 850 (N.D. 1982), *supra* notes 123-125.

[141] State v. Turner, 550 N.W.2d 622 (1996), *supra* note 14. The Minnesota Supreme Court found that although the statute was worded somewhat vaguely, the preamble to the statute made it clear that the Legislature intended for the journalist's privilege to apply only to confidential sources. *See* Minn. Stat. Ann. §§ 595.022-595.023 (West 1988, Supp. 1997). It is unclear whether a recent change in the Minnesota shield law has resolved the problem. *See supra* note 54.

The lack of a national consensus on the need for a journalist's privilege for either confidential or nonconfidential information may prove troublesome in coming years with the increased popularity of the Internet, which knows no state (or national) boundaries. Already, a Clinton administration official accused of spouse abuse in an on-line column has sought the columnist's confidential sources in a defamation suit.[144] In another case making headlines, a murder defendant's attorney in California sought a newspaper's electronic mail from readers and the information that shows where e-mail comes from in a change-of-venue action. The attorney hoped to prove that readers in a neighboring county had been keeping up with the murder case, and thus the jury pool was tainted over a wide area.[145]

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[142] In re Sarah Lynn Owens, 1998 N.C. App. LEXIS 139 (N.C.App. 1998) (no privilege for reporter's nonconfidential interview of murder suspect); ORDER TO TURN OVER INTERVIEW NOTES ABOUT ACCUSED KILLER STAYED, NEWS MEDIA UPDATE 3 (March 23, 1998) (state Supreme Court to hear case of reporter ordered to turn over notes of interview with murder suspect).

[143] COURT FINDS FIRST AMENDMENT DOES NOT PROTECT MEDIA FROM SUBPOENAS, NEWS MEDIA UPDATE 2 (March 9, 1998).

One alternative for those hoping for a more uniform and widespread protection for journalists is to seek a new Supreme Court ruling that would clarify *Branzburg*. As the SPJ report warned, however, such a move could backfire, resulting in a decision even more destructive of First Amendment press rights than *Branzburg*.[146] Any challenge to *Branzburg* would have to overcome the Court's long-standing acceptance of the principle that precedent should rule. Of course, one could argue, not entirely tongue-in-cheek, that the Court's first mission in a *Branzburg* challenge would be deciding what the precedent is, given the divided nature of the opinion.

The lack of consensus among the states about a privilege also could work against the media, particularly if a case appealed to the Supreme Court involved nonconfidential information. Although the Court recently went against its trend of narrowing or denying privileges in recognizing the psychotherapist-patient privilege at the federal court level,[147] the decision largely hinged on the fact that all fifty states already recognized the privilege. Such unanimity is lacking when it comes to the journalist's privilege.

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[144] KAREN BRESLAU, A CAPITAL CYBER CLASH, NEWSWEEK 63 (Oct. 20, 1997).

[145] IVER PETERSON, MURDER SETS STAGE FOR BATTLE OVER NEWSPAPER'S WEB COVERAGE," N.Y. TIMES A-16 (Oct. 19, 1997).

[146] SPJ Report, *supra* note 12.

Particularly with regard to nonconfidential information, journalists and their attorneys who want to persuade courts and legislators to recognize or strengthen the journalist's privilege are going to need more evidence. Journalists, media attorneys and academics have largely ignored the issue of a nonconfidential-information privilege until recently. Although the Reporters Committee for Freedom of the Press and the Society for Professional Journalists, along with a few academic researchers, have provided empirical data about the numbers of subpoenas served on journalists in recent years, the data have not shown what tangible effects the subpoenas have on journalists and their sources. It should be remembered that the effect of forcing the journalists to testify was on the minds of all the *Branzburg* justices, although they came to different conclusions about whether the effects were serious enough to warrant recognizing a constitutional privilege. Journalists, media lawyers and academics still have a long way to go to determine what effects subpoenas for nonconfidential information have on what the public reads, sees and hears.

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[147] Jaffee v. Redmond, 116 S. Ct. 1923 (1996).

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